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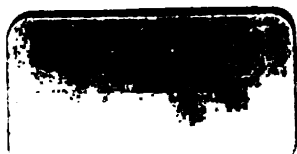
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FREDERICK ALLIS
ATTORNEY & COUNSELLOR AT LAW
NO. 1 BROADWAY NEW YORK

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MODERN REPORTS;

O R,

S E L E C T C A S E S

A D J U D G E D I N

T H E C O U R T S

O F

K I N G ' s B E N C H,

CHANCERY, COMMON PLEAS,

A N D

E X C H E Q U E R.

VOLUME THE FOURTH.

OF THE
SHERIFFS, JR., ALTHOUGH
LAW ENFORCEMENT.

U.S. Masters

Smith

ADJUDGED IN
THE COURTS
OF
KING'S BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER.

CONFIDENTIAL

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JUL 15 1901

THE P R E F A C E.

BEFORE I give an account of the following cases, I shall mention something of REPORTS in general.

WE have no printed cases of the ancient proceedings either in the *sheriffs torn*, or in the *county-courts*; the reason whereof may be, because JUSTICE was then administered in a summary way, and *de plano*.

NEITHER have we any for above one hundred years after the courts of law were settled in *Westminster-Hall*; which was about the later end of KING JOHN. But in the reign of *Edward the Third*, when the professors of the law, as my LORD COKE observes, were excellently learned, and when SERJEANTS drew their own pleadings, then, as he farther mentions, jangling and questions did arise, and exceptions were taken more to *form* than to *matter*.

It was then our book-cases began, and have been continued ever since. And it is necessary it should be so, because the opinions of lawyers are generally guided by those of their predecessors, in which they seem to imitate the ancient *prætors*, who established their judgments, not so much upon their own reason, as upon the written laws of the empire.

See Dr. Taylor's Elements of Civil Law. 214. 215.

THE PREFACE.

IT is true, it was the complaint of that learned person before-mentioned, that he liv'd in a scribbling age, and that *quotidie plus, quotidie pejus scribunt*; yet he wrote on. And so has the collector of these cases, who for several years attended that court in which they were adjudged, and has not only compared them with THE RECORDS, but was assisted in the *special pleadings* by a very able clerk, who was particularly concerned in them. Some, and but a few of them, are reported by others, and recommended by a great name in the title-page, which is a certain advantage to the book-seller, whether it is so to the reader or not; but it is the benefit of the reader which is chiefly intended by these papers.

THE quotations in the margin have been carefully examined with the books, and out of the great number of Authorities which are usually cited at THE BAR, none are here inserted but such as seem pertinent to the case in question.

AND that nothing might be wanting to this work, a much more than usual care has been had in the correction of it; and the nice examination of THE ROLLS, however troublesome and expensive, has been performed perhaps beyond what has been done in most books of this nature. So that it may well be hoped that those few mistakes, which possibly have escap'd the press, may easily be corrected; as well as those of the author, which he believes not to be any where material; but has not the vanity to think himself not obnoxious to errors, as all mankind must always be.

Vale.

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HILARY

HILARY TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* Symonds against Cudmore.

[1]

Case 1.

AN EJECTMENT was brought for one messuage, one curtilage, and a garden, in the parish of *St. Paul*, in the city of *Exeter*, on the demise of *Nicholas Martin, &c.*

A fine levied by a tenant in tail, who has the immediate reversion in fee in himself, will merge the estate tail and bring the reversion in fee into immediate possession, and thereby render it liable to the incumbrances of all those who were seised of it.—Thus if *A.* being tenant in tail with reversion in fee, make a

Upon *not guilty* pleaded, the jury found a special verdict; That *Sir Nicholas Martin*, being tenant for life, with remainder in tail to *William* his eldest son, and having a power to make leases for twenty-one years, or three lives, reserving the ancient rent, did make a lease to *Clement Westcome* for ninety-nine years, if *Richard* and *Nicholas Westcome* should so long live, reserving the ancient rent, which was eight pounds ten shillings *per annum*. *Sir Nicholas Martin* died, leaving issue *William Martin* his eldest son and heir, who, being then seised of the remainder in tail, and also of the reversion in fee expectant upon the determination of that estate, did by indenture *release* the said rent, and before the determination of the aforesaid lease made by his father, did demise the premises to *Elizabeth Westcome* for ninety-nine years, if *George* and *Wil-*

lease for years, and on his death, before the term expires, the *issue in tail* levy a fine, this lease cannot be avoided by him or by the *conuses* of the fine; for although, as the lease was derived out of the estate tail and also out of the reversion, the *issue in tail* might have avoided it, yet having destroyed the entail by the fine his power is gone; and the *conuses* cannot avoid it because he is a stranger, who never had any privity in the estate in tail.—*S. C. Salk. 338. S. C. 1. Show. 370. S. C. Skn. 284. 317. 328. S. C. 3. Salk. 335. S. C. Carth. 257. S. C. 12. Mod. 32. S. C. Holt, 666. S. C. 1. Freem. 503. 3. Co. 90. Dyer, 213. Plowd. 435. 1. Saund. 261. 1. Lev. 168. 3. Mod. 268. 2. Atk. 204. 3. Bac. Abr. 324. Cruise on Fines, 275. 4. Brown P. C. 594. Cowp. 379. 4. Com. Dg. "Estate" (B. 25.).*

Hilary Term, 2. William & Mary, In B. R.

SYMONDS
against
CUDMORE.

liam Westcome should so long live, to commence after the determination of the first lease. *William Martin* died, leaving issue *Nicholas Martin* his eldest son and heir, who, being the issue in tail, levied a fine to the use of himself, and his heirs. Afterwards the first lease determined; then *Nicholas Martin* entered, and made a lease to the plaintiff *Symonds*; upon whom *Cudmore* the defendant, being the assignee of the second lease, entered.

- The question was, Whether his entry was lawful?

* [2]

* Those who argued *for the plaintiff* would have the estate tail in being; and that though it might be barred by the fine, yet it was not extinct; therefore they would not have the lease void, but voidable by the issue in tail, and that the cognizee of the fine might avoid it, as the issue in tail might have done if the fine had not been levied. They argued, that at the common law all estates of inheritance were in fee; and before the statute *de donis*, the donee had a fee-simple conditional, and might have barred his issue; that by the statute of 13. *Edw. 1. c. 1. de donis, &c.* called *the statute of Westminster the Second*, the common law was altered; which statute was made for the benefit of the issue, by restraining the tenant in tail, either before or after issue born, to bar or change the estate. It is true, if he had made a feoffment with livery, it would work a discontinuance of the tail, because he had an estate of inheritance, and in such case the issue in tail must have brought his real action; but now, by subsequent statutes, power is given to tenant in tail to bar his issue by fine (a). If this lease should not be voidable, then it would be good as long as any of the issue in tail are living, but that cannot be, because it is not for the benefit of such issue that it should be so; and for this reason the Books are very plain, that alienations made for their benefit, and not to their prejudice, are binding (b). Admitting it therefore to be voidable by the issue in tail, then the cognizee in the fine must have the same power to avoid it as the issue in tail had before the fine levied: and to prove this, they relied on my LORD COKE's Comment on *Littleton* (c), that if tenant in tail make a lease for forty years, reserving rent, to commence ten years after, and die, and then the issue in tail enters and makes a feoffment to B. and the ten years expire, and the lessee enters, and B. accepts the rent, and waves the possession of the land; this makes the executory lease good, because he shall have the same election as the issue in tail had, either to make it so or avoid it. It may be objected in this case, that the lease made by the tenant in tail never commenced till after the fine levied by the issue; and therefore it could not arise out of the estate tail, because it was extinguished by the fine, and that if it arise out of any thing, it must be out of

(a) By 4. Hen. 7. c. 24. and 32. Hen. 46. *Edw.* 3. pl. 4.; and Co. Lit. 3. c. 34. 23. b.
(b) Year Books 44. *Edw.* 3. pl. 21.; (c) Co. Lit. 46. b.

the

the reversion in fee; * which opinion may receive this answer; That the estate tail was not extinguished by this fine, because the law will suppose an existence of it in the cognizee to prevent a wrong; and therefore where such an estate is intermixed with a fee, it shall have a being against this wrongful and tortious lease. In *Errington's Case* (a) there seems to be an opinion against this; the case was thus: *Roger Errington* and *Katherine* his wife were tenants in special tail, reversion in fee to *Roger*, who died; the issue in tail, who had also the reversion in fee, in the life-time of *Katherine* his mother made a lease for forty years to *Robert Errington*, to commence after the death of *Katherine* his mother, and died; the reversion descended to *Jane Errington*, who in the life-time of *Katherine* levied a fine *sur consueance de droit come ceo* to *I. S.*; the mother died: the cognizee of the fine shall not avoid this lease, because he who made it was inheritable to the estate tail, and likewise to the reversion in fee, and so it issues out of both; for being actually seised of the fee simple he charged the reversion, and the lease is good against him by way of *escheppel*, and by way of *interest* also out of the reversion, and the estate tail is not only barred, but extinct by the fine. But there was no judgment given in that case; my LORD COKE was there of a contrary opinion to *FLEMMING, Justice*: and in *Capell's Case* (b), which was adjudged in the twenty-third year of the queen, and published in his first book of Reports, there is a contrary resolution; it was thus: The remainder man in tail granted a rent-charge, and the tenant in tail suffered a common recovery, and, having aliened the estate, died without issue; the grantee distrained for rent, and the alienee replevied; and it was held, that the title was in him, because the common recovery suffered by the tenant in tail did bind all the remainders, and all leases made by them.

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against
CUDMORE.

Ld. Ray. 33.
521. 779. 781.
855.
10. Mod. 103.
11. Mod. 412.
265.
1. Peer. Wms.
520.
3. Peer. Wms.
171. 265.

Those who argued for the defendant said, that the lease for years was not to be avoided by the issue in tail, because it arises even out of the estate tail, and likewise out of the reversion; and therefore it must be a good lease, though the tail might be barred by the fine (c); for it was made by *William Martin* when he was tenant in tail, and for that reason it is not void against his issue; but, the issue having levied a fine, the estate tail is then extinct, so that the cognizee cannot come in privy of it, he being a mere stranger, and therefore shall not avoid this lease. * Where tenant for life (d) and remainder man in tail joined in a lease to *A.* for life, remainder to *B.* for life, rendering rent, and the tenant for life died, and the remainder man accepted the rent of the first lessee for life and died, and the issue in tail entered, and accepted the rent likewise, and made a feoffment and levied a fine to *S.* who bought the land, and then the first lessee for life died; it was held that the purchaser should

* [4]

Gilb. Eq. Rep.
85.
2. Peer. Wms.
127.

- (a) *Errington v. Errington*, 2. Bulst. 42.
(b) 1. Co. 61. Poph. 5. Moor, 154. Jerk. 250. 1. And. 282. 4. Leon. 150.
(c) *Cro. Jac.* 688. *Bridgm.* 27. 1. Roll. Abr. 843. *Hob.* 258.
(d) *Jeffery v. Coyte*, *Cro. Eliz.* 252. S. C. 1. Roll. Rep. 19.

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never avoid this lease in remainder, because it arises out of both the estates of the tenant for life and him in remainder in tail, and therefore the acceptance of the rent by the issue in tail made good both the estate for life to *A.* and also the remainder to *B.* for life. There is a case which governs this at bar; it was adjudged in the court of common pleas in *Trinity Term*, 3. *Car.* 1. upon a demurrer in replevin (*a*), and it was shortly thus: The father was tenant for life, remainder in tail to his son, remainder in tail to the father, remainder in tail general to the son, remainder in fee to the father; they both granted a rent charge by deed to the defendant in fee; then they joined in levying of a fine, and declared the uses to the father in fee, who made a feoffment to the plaintiff and died; and the question was, Whether the estate of the feoffee should be charged with this rent? because it being granted by the tenant for life, though it was confirmed by the remainder man in tail, it is void as to him, and therefore it was said that it must arise only out of the estate for life: but it was held, that because the tenant for life had likewise a remainder to the estate both in tail and in fee, that this rent issued out of all his estates, and, the tail being barred by the fine, the feoffee must come in under all the estates of the feoffor, who must hold it charged with the rent (*b*). So in this case the lease arises out of both the estates of *William Martin*; and the issue in tail shall never avoid it by this fine.

Afterwards in *Hilary Term*, the fourth and fifth of *William and Mary*, JUDGMENT was given for the defendant, and that the cognizee of the fine could not avoid this lease made by *William Martin*. The reasons were, because it was an interest derived out of the estate tail, and it charged also the reversion in fee; for after the determination of the first lease made by *Sir Nicholas Martin*, his son, who had the remainder in tail, might have suffered a recovery and barred the estate tail. * Suppose this was not a void lease, but voidable by the issue in tail, yet, after the fine levied by him, the cognizee shall never avoid it, because he cannot be in privity to the estate tail, for that is extinguished by the fine; and the cognizor, having thereby divested himself of that power which he had to avoid this lease, can never transfer it to the cognizee (*c*). Now it cannot be a doubt, whether the estate tail is extinguished or not: it is true, by the express words of the statute of 32. *Hen.* 8. c. 36. it is barred; the words are, "that a fine levied of lands entailed on the cognizor, or any of his ancestors, shall be a bar against the person and his ancestors claiming by force of such entail." And it has been often held upon this statute, that a fine levied by a remainder man in tail during the estate of a tenant for life, was an *extinguishment* of the entail (*d*).

* [5]

- 1. *Ld Ray.* 782.
- 1. *Vern.* 226.
- 11. *Mod.* 179.
- 245. 265. 412.
- 1. *Peer. Wms.*
- 520.
- 2. *Peer. Wms.*
- (605.)
- 3. *Peer. Wms.*
- 230.
- Comyns*, 369.
- Stra.* 12.

(*a*) *Sir Thomas Holt v. Sambach*,
Cro. Car. 103.
(*b*) But judgment was given for the
plaintiff upon the insufficiency of the
avowry, without any regard to the mat-

ter of law, *Cro. Car.* 104.

(*c*) 1. *Salk.* 338. 1. *Leon.* 85.

2. *Leon.* 37. 4. *Com. Dig.* 27.

(*d*) 2. *Leon.* 37.

If

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If it should be otherwise, then there would be two fee simples in one and the same person; a *qualified fee* determinable upon the death of tenant in tail dying without issue, and an *absolute fee* out of the reversion, which cannot be. As to acceptance or refusal of rent, it is not much material either to affirm or avoid this lease; for unless the issue in tail enters, the lease shall not be avoided. To prove this a case in *Dyer* was cited (*a*); which was, Tenant in tail, before the statute of Uses, made a feoffment in fee to the use of himself and his heirs; then he and the feoffees join in a lease for years, rendering rent; then the statute was made, and the tenant in tail died seised; afterwards the issue in tail levied a fine, and aliened the land before he made any entry upon the lessee, or accepted the rent; the alienee did accept it; but whether he had done so or not, he could never avoid the lease, because it was not void by the death of the tenant in tail without the actual entry of the issue. To maintain this judgment, another case was also cited (*b*) which was, Husband and wife tenants in tail, remainder to the husband in fee; they had issue *A.*; the husband died; the issue in tail, in the life-time of his mother, levied a fine to *Sir George Brown* and his heirs; the mother made a lease for life, not warranted by the statute of 32. Hen. 8. c. 28.; this was a *discontinuance*, and therefore a forfeiture, and *Sir George* might well enter thereupon; for the fine shall not operate by way of conclusion, and the mother be still tenant in tail; but the estate-tail is barred and extinct as to the issue in tail. * And for these reasons, and upon these authorities, *William Martin* the tenant in tail having also the reversion in fee, the lease made by him issues out of both the estates, and the issue in tail has extinguished the estate tail by levying of the fine, so that the cognizee must be in of the reversion in fee.

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Ld. Ray. 33.

* [6]

In the argument of this case at the bench, *DOLBEN, Justice*, said, that the case of *Opie v. Thomasius* (*c*) was neither well stated or well reported by *Mr. Siderfin*. It was thus upon the *ROLL*, *Pasch.* 15. *Car.* 2. *Roll* 375. A man seised in fee made a lease for ninety-nine years, if three persons so long lived; then settled the reversion upon himself in tail, with power to make leases for twenty-one years, and then he made such a lease and died; *the son*, who was the issue in tail, and not *the father*, as it is reported there, levied a fine and sold the reversion; the first lease determined upon the death of three lives; and it seemed to the Court that the cognizee might avoid this second lease (*d*), because it was never in the election of the tenant in tail or of his issue to avoid it, they having conveyed away their estates before this second lease was to commence; for if tenant in tail make a lease to commence *in presenti*, and convey away his estate by fine, the cognizee must hold it

3. Bac. Abr.

(a) *Dyer*, 51.

(b) *Lynch v. Spencer*, Cro. Eliz. 513.

1. Co. 50.

(c) 1. Sid. 260. S. C. 1. Lev. 167.

S. C. Raym. 132. S. C. 1. Keb. 798.

910.

(d) See 1. Lev. 168.

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charged with such lease; but if it be to commence *in futuro*, it is otherwise, because it cannot be avoided before the commencement. But he said there was no judgment given in that case; there were only three Judges then in court; KELYNGE, *Chief Justice*, who spoke nothing to the point; and TWISDEN and WYNDHAM, *Justices*, who were divided in opinion.

Case 2.

Chettle against Lees.

Formerly the entry of a *miser cordia* instead of a *capiatur* rendered the judgment erroneous; but it is now remedied by the 16. & 17. Car. 2. c. 8.

12. Mod. 104.
1. Ld. Ray. 565.
2. Ld. Ray.
1284.
3. Bac. Abr.
106.

THE PLAINTIFF obtained a verdict, and the judgment was entered with a *miser cordia* instead of a *capiatur*.

A motion was made to arrest this judgment, because it was an error not amendable by the statute of 8. Hen. 6. c. 12. for that only helps the misprision of clerks in entries of the judgments, but this is the fault of the Court in giving judgment; and therefore in an *assumpsit*, where judgment was against the defendant, and the entry was, that the plaintiff should recover a hundred pounds assessed by the jury, and five pounds *pro missis per jur. hic de incrementa adjudicat.* when it should have been *per Curiam*; it was held not amendable (a). So in debt against an executor, *capiatur* was entered instead of *miser cordia*, and it was held likewise not amendable (b).

* [7]

* *E contra.* On the other side it was said, that in former times the Courts were very strict in amending; but now, since there are so many statutes of *Jeofailes*, the Judges have thought fit to amend any thing that may help and support a judgment fairly obtained; the judgments being their own judgments. There have been amendments allowed in many things more material than this; as in an *ejectment*, the judgment was, *quod querens recuperet damna et custugia*, instead of *quod recuperet terminum* (c). So if judgment be for the defendant upon a demurrer, and the entry be, that such a day *prædict. quer. licet solemniter exactus non venit*, which is the entry of a judgment upon a nonsuit, and not upon a demurrer, yet it is amendable (d). So where judgment was against the plaintiff, and there were several defendants, the entry was, that the plaintiff *nil capiat per breve*; and that the defendants *eant inde sine die*, was wholly left out; but it was amended (e). Nay an amendment has been even in this very point; where upon a writ of error upon a judgment in dower, the record certified was, that the defendant was in *miser cordia*, who being in that case an infant and appearing by guardian, ought not to be amerced; and therefore it was amended, and made *et nihil in miser cordia quia infans* (f).

But PER CURIAM, This is now remedied by the statute of .16. and 17. Car. 2. c. 8. which enacts, "that judgment shall not be stayed after verdict for want of *miser cordia* or *capiatur*."

(a) Cro. Eliz. 497. Blackmore's Calc. 8. Co. 162. Palm. 98. 3. Bac. Abr. 106.

(b) Moor, pl. 502.

(c) 3. Roll. Abr. 206.

(d) 1. Roll. Abr. 205. Cro. Jac. 632.

(e) 2. Saund. 289.

(f) Cro. Car. 410. Hob. 127.

Cone *against* Bowles.

Cafe 3.

JUDGMENT was given in the common pleas for the avowant, In replevin, if and damages and costs: the plaintiff in replevin brought a judgment be writ of error in this court, and the judgment was affirmed. given for the avowant, he shall not be allowed costs on a writ of error, though the judgment be affirmed; for he is not a plaintiff with a 3. *Ham. 7. c. 10.*

And now a motion was made, that *the avowant* might have costs upon the statute of 3. *Hen. 7. c. 19.* which enacts, "that *the plaintiff* shall recover costs and damages, where the defendant brings a writ of error to delay execution of the judgment:" That the *avowant* here is in the nature of a *plaintiff*, and has a judgment *de return. habend.* given, and is within the reason of that statute, because his execution is delayed by such writ of error, as well as the judgments obtained by plaintiffs in other actions; and so, consequently, * also is within the equity of the statute of 3. *Jac. 1. c. 8.* which appoints bail to be given in a writ of error to prosecute it with effect, and to pay all costs and damages to be awarded for delaying of execution. *S. C. Carth. 122. 179.*

BUT THE COURT allowed no costs (a).

S. C. 12. Mod. 2. S. C. Holt, 358. Post. 245. Dyer, 77. Cro. Car. 145. 175. 401. Cro. Eliz. 588. 2. And. 123. Cro. Jac. 636. Ld. Ray. 788. 3. Com. Dig. "Costs" (B.). Dougl. 709. 751.

(a) By 8. & 9. *Will. 3. c. 11.* "if any person shall commence or prosecute in any court of record, any action, plaint, or suit wherein, upon any demurrer, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the Court against such plaintiff or demandant; or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff or demandant shall sue any writ or writs of error to annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein; the defendant or tenant in every such action, plaint, suit, or writ of error, shall have judgment to recover his costs against every such plaintiff or plaintiffs, demandant or demandants, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*" And by the 4. & 5. *Ana. c. 16.* for preventing vexation from suing out defective writs of error, it is enacted, "that upon the quashing of any writ of error for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had if the judgment had been affirmed, and to be recovered in the same manner." See 2. *Stra. 834. 2. Ld. Ray. 1403. 1. Stra. 262. 139. 606. 617. 2. Mod. 316. Hullock on Costs, 290.*

The King and Queen *against* Fezas.

Cafe 4.

THERE was a libel in the spiritual court *causa jactitationis maritalitatis*. Pending that suit the woman exhibited an indictment libelled against in this court against all the witnesses who might prove the marriage, and it was for a conspiracy by force and arms to carry her away against her will, &c. This indictment was brought that the parties might be convicted upon the oath of the woman, and so indisting the witnesses who are to prove the marriage for conspiring to carry her away by force, yet the Court will not stay the trial of the indictment on account of the suit for jactitation not being determined.

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THE KING
AND QUEEN
against
PEZAS,

disabled to be witnesses in the ecclesiastical court to prove the marriage, which by this means might be avoided.

PEMBERTON, *Serjeant*, therefore moved to stay proceedings upon the indictment until the suit in the spiritual court was determined.

TREMAINE, *Serjeant*, and THE KING'S COUNSEL opposed this as not practicable, to stay proceedings in the king's cause for any matter depending in a private court; especially in this case, where the indictment was for a force in taking and carrying away of a woman, and marrying her against her consent, and so a thing collateral to the suit in the other court. Neither was this suit for delay, for the defendant had indicted two of the witnesses against him for perjury.

THE COURT would not stay the proceedings upon the indictment.

The prosecutrix of an indictment for a conspiracy is a competent witness, altho' the conviction will prevent the defendants from giving testimony against her in a suit for *jactitation* in the spiritual court.

But it was tried at the bar, and the woman being produced as a witness, it was objected against her, that she ought not to be allowed to give her evidence, because there was a marriage proved in the spiritual court; and where the consequence of the evidence will redound to the benefit of the witness, he is always rejected.

CURIA. *Brown* was executed for stealing *Mrs. Ramsey* (a), and she was allowed to be a witness in that case. And in *Fulwood's Case* (b) upon the statute of 3. Hen. 7. c. 2. the woman was allowed to be a witness.

And so she was in this case.

2. Vern. 79.
10. Mod. 193.

11. Mod. 224. Stra. 633. 1. Peer. Wms. 611. 2. Hawk. P. C. 46. f. 24.

(a) 1. Vent. 243. 3. Keb. 193. (b) Cro. Car. 482. 484. 488. 492.

* [9]
Case 5.

* Cudlip against Rundall.

Trinity Term, 2. Will. & Mary, Roll 646.

An action on the case will lie by a lessee for years against his under lessee, for so negligently keeping his fire that the premises were burnt down.

ACTION ON THE CASE. The plaintiff declared, that on the twentieth day of *May*, in the thirty-sixth year of *Charles the Second*, he was possessed of a term for years in a house, and that the same day he let it to the defendant for seven years by indenture, by virtue whereof he entered, and afterwards so negligently kept his fire that his house was burnt. The defendant pleaded, *non dimisit per indenturam prædictam modo et formâ prout*, &c. and upon this they were at issue.

8. C. 1. Show. 310.
8. C. Carth. 202.
8. C. Comb. 177.
8. C. 3. Salk. 156.
8. C. 12. Mod. 14.
8. Mod. 275. 1. 2. Mod. 100. 151. Comyns, 32. Stra. 405. 550. 763. 1d. Ray. 99. 264. 737. 1. Com. Dig. 430. 294.

The jury found a special verdict; the substance whereof was, That the plaintiff was possessed of the house, and that by indenture bearing date the 25 *May*, made between him of the one part, and the defendant of the other part, he demised the tenement

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to the defendant and his assigns for seven years; "except and always reserved out of the said demise and lease to the plaintiff, his executors and administrators, the house commonly called *the new house*, for the use of the plaintiff and his father, and of his and their family, if he or they please to dwell therein, but not to be let to any other person; and at all other times when they do not live there, then to the use of the defendant and his assigns." They find, that there was a *new house* and an *old house*, and that a fire happened in a room of *the new house*, then in the possession of the defendant, and burnt it down: and if this was a demise *modo et formâ*, then they find for the plaintiff; if not, then for the defendant.

COURT
against
RUNDALL.

TREMAINE, *Serjeant*, made two points upon this case:—THE FIRST was upon the declaration itself, Whether such an action would lie by the lessee for years against his under lessee? And he held that it would, because the plaintiff himself is chargeable to his lessor by reason of consequential damages: it is like the case of a master, who may maintain an action for the beating of his servant. It is true, the *Countess of Shrewsbury* (a) brought the like action against a *tenant at will*; and the judgment was, *quod querens nil capiat per billam*; but the reason of that judgment was, * because, at the common law, there was no remedy against a lessee for life, or a lessee for years, for voluntary or permissive waste; for they having an interest in the land by the act of the lessor, it was accounted his folly to grant such estates, without restraining the parties by covenants from doing any waste (b).

* [10]

1. Vern. 23.
157.
2. Vern. 711.
738.
Prec. Chan. 454.
9. Mod. 109.
3. Peer. Wms. 267.

Gill. E. R. 127. 1. Peer. Wms. 406. 527. 2. Peer. Wms. 240. 397. (606.) 3. Peer. Wms. 267.
Cases T. T. 12. 16.

THE SECOND POINT was, Whether upon this issue, *non dimisit modo et formâ*, there is not a variance between the demise and the finding by the jury? And he held it was not. For the plaintiff declared, that he was possessed of a house, and that he let it, &c. which the defendant denied *modo et formâ*; and the jury find, that he did let the house except *the new house*: now the words *modo et formâ* are of course here (c), and no part of the issue; it is still a demise of the house, and the legal interest is in the lessee (d), the other had only a privilege to live in part of it; and if denied, of *non dimisit modo et formâ*; a verdict finding, "that plaintiff was possessed of the house, and demised the houses to the defendant for seven years, except that part called *the new house*, and which part was let to him as *tenant at will*," will not support the declaration.—2. Roll. Abr. 692. 3. Leon. 80. Hob. 53. Cro. Jac. 140. Ld. Ray. 864. 8. Mod. 3. 10. Mod. 300. 11. Mod. 64. Fitzg. 187. 3. Peer. Wms. 493. Comy. 478. Stra. 514. 845. 1089. 1125. Cowp. 766. Dougl. 327. 720. 1. Term Rep. 447. 659.

(a) 5. Co. 13.

(b) By 14. Geo. 3. c. 78. s. 86. "no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any re-

"compence be made by such person for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding, &c. &c."

(c) Co. Lit. 281. b.

(d) Pyot v. Lady St. John, Cro. Jac. 329.

he

CUDLIP
against
RUNDALL.

he had no remedy but by action of covenant, for it will not create such an interest as will maintain an ejectment. If a jury find more than they ought, yet judgment shall be given for the plaintiff: there are many authorities to this purpose; as in waste (a), the defendant made a feoffment to the use of himself for life, remainder to the plaintiff and his heirs; the defendant pleaded that he was seised in fee, and traversed the making the feoffment; and the jury found that he made a feoffment to the use of himself for life without impeachment of waste; yet the plaintiff had judgment, because the jury had found such an estate as was alleged by him; and though they had also found that it was dispunishable of waste, it being more than what was in issue, yet the defendant having taken no advantage of it in pleading, the plaintiff recovered (b). But this case depends upon the construction of the words in the exception, in which if the subsequent words qualify those which go before, then an interest passes to the defendant. Now the exception, as it stands by itself, seems to be against the plaintiff; but the subsequent words make the sentence plain, that a liberty only is reserved for the plaintiff to use *the new house* (c). There are several cases which prove that precedent clauses may be qualified by words which come after in the same sentence; as a demise of *the demesnes* of his manor, in which the lessor also granted the keeping of the park, it was held that the soil of the park did not pass, though the first words did carry * the whole estate; but the subsequent words shew in what manner he shall have it.

* [11]

ANOTHER REASON urged for the plaintiff was, that this exception is void, because it is contrary to the demise; and to prove this, a case was cited out of *Dyer* (d), which was, Husband and wife had a lease of a house in *Fleet-street*; the husband made an under lease for part of the term, excepting the shops for his own proper use; the husband dies; the wife entered and was ousted, and brought an ejectment for the whole; and my LORD DYER was of opinion, that the shops being leased generally, and the exception being only restrained to the use of the husband, without saying "his executors or assigns," it was contrary to the premises, and so the exception was void; which, he tells us, was the opinion of the other Justices *tandem*. It is true, the same case is reported in *Bendloe* (e); but that report cannot be true, because it refers to *Dyer*, where it is otherwise. It is likewise reported by my Lord Anderson (f) that the exception was absolute; but this seems to be upon the first argument of that case, for my Lord Dyer is express that *tandem* the Judges were of another opinion.

(a) *Clare v. Pepys*, Cro. Eliz. 41.
S. C. Owen, 91.

(b) Year Book 12. Hen. 8. pl. 1.

(c) 3. Bulst. 68. Owen, 64. 1.
Cro. 208.

(d) *Dyer*, 264. S. C. Bendl. 181.
See also Moor, 880. Lanc. 69.

(e) Bendl. 181.

(f) 1. And. 52.

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ROE, and OTHERS, *contra*. AS TO THE FIRST POINT it was argued, that this action would not lie by a lessee for years against his under lessee, for this exception made him only *tenant at will* in the *new house*, which was never demised to the defendant, but totally excepted by express words (a). It is an exception which does not go to the whole term demised, but it is restrained to the time when the plaintiff shall reside there; it imports no more than an agreement when one does not use the house the other shall, and therefore no interest passes: if so, it cannot be a demise for seven years *modo et forma*, it is only a lease at will: and for an authority in point, the case of *Hornby v. Clifton* (b) was cited, which was this: *Hornby* made a lease of a house to *Clifton*, "except and always reserved two chambers, &c. *pro suo proprio usu et occupatione*." *Hornby* died; his wife married again; and the husband entered into the chambers excepted, and being turned out, he and his wife brought an ejectment; and, upon not guilty pleaded, they had judgment, because the exception was absolute, and the words "*pro suo proprio usu*" were held to be vain and immaterial. It was agreed, that where an exception is repugnant to the premises the grant is void, but it is not so here: * That the end of an exception is to take something out of the grant which would otherwise have passed, and it is always of such things which are in being at the time of the making of the grant. Here it is "except and always reserved, &c." now this word "*always*" is of as great signification as if the whole term had been reserved. But it must be taken either as a description of the thing excepted, or a declaration for what purpose it was excepted. It cannot be taken in the first sense, and therefore it must be construed as a declaration to what use it was excepted, and that is by the express words to the plaintiff and his assigns. Besides, this house was "not to be let to any other person whatsoever," which words would be idle, if the plaintiff had only a personal use to himself.

If a man be possessed of a new house and an old house, and make a lease with an exception of the new house for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee, the new house is wholly excepted out of the demise; but the latter words make the lessee tenant at will.

Co. Lit. 47. a.
Dyer, 19.

5. Co. 11.

• [12]

Cro. Eliz. 522.
a. Roll. Abr.
455.

THE COURT making some doubt, upon the first argument, whether this was a *tenancy at will* by the subsequent words, one of the Justices being of opinion that the defendant could not be tenant at will, because the plaintiff must have been non-suited if he had not proved a demise for seven years, therefore time was taken to consider of it.

Afterwards in *Hilary Term*, in the fourth year of the *King*, judgment was given: FIRST, That the defendant was *tenant at will*, and no more; that this could not be a lease for seven years, because it was at the pleasure of the lessor when and how long the defendant should enjoy it; and therefore it was held that the *new house* was absolutely excepted out of the demise, and it was such an exception which was not qualified by the subsequent words, being fully excepted before.

(a) 2. Saund. 206. 1. Sid. 405. (b) 1. Andr. 51. Dyer, 264.
Quesn. 20. Cro. Eliz. 237. Bend. 181.

Then

Hilary Term, 2. William & Mary, In B. R.

CERTIORARI
against
RUNDALL.

SECONDLY, As to the action it was held, that he who has the inheritance cannot have an action against tenant at will (*a*), but the lessee for years may: that in this case the estate is not the question, but consequential damages.

THIRDLY, That the finding of the jury was out of the issue; for if trespass be brought, and the defendant should plead *son frank-tenement*, and the jury find him *tenant in common* with another, there is a good cause of action found, but it is out of the issue, and will not maintain the declaration.

JUDGMENT was given for the defendant.

(*a*) See 5. Co. 13. Cro. Eliz. 777. 784. 1. Salk. 19.

* [13]

Cafe 6.

* *Baugh against Killingworth.*

An action on the case will not lie against a person for suing another in the Sheriff's Court in London for arrears of rent due in the country.

S. C. 12. Mod. 4.
Caith. 189.
7. Show. 254.
Lutw. 1570.
Cro. Eliz. 836.
Hob. 205. 267.
Stra. 114. 691.
1198.
Fitzg. 43. 98.
173.
Ld. Ray. 378.
437. 768. 813.
1072.
8. Mod. 227.
307.
10. Mod. 145.
209. 220. 307.
11. Mod. 180.
12. Mod. 379.
408. 515. 598.

THE PLAINTIFF was indebted to the defendant for the rent of a house and lands in the country, and coming to London was arrested, by the defendant, by virtue of a plaint levied in the sheriff's court of London; for which the plaintiff brought an action on the case, and declared, "Whereas the said *Killingworth*, wickedly and fraudulently intending the said *Baugh* greatly to aggrieve and unjustly to oppress, on the fifteenth day of *April*, in the tenth year of the reign, &c. unjustly and maliciously at *London*, &c. the said *Baugh*, by pretence and colour of a certain *plaint* in the court of the lord the king and the lady the queen then held before *John Fleet*, gentleman, then one of the sheriffs of the city of *London*, in his COMPTER, situated in the parish and ward aforesaid, entered and levied at the suit of the said *Killingworth* upon a certain pretended action, to the great pretended damage of him the said *Killingworth*, caused and procured the said *Baugh* to be arrested and imprisoned, and the said *Baugh* a long time in the prison and custody there by reason of the arrest aforesaid, to wit, for the space of six days, for want of sufficient manucaptors and bail to the said pretended action, for the pretended damages aforesaid, to be detained; whereas in truth and in fact, the aforesaid *Killingworth* at the time of the arrest and imprisonment of him the said *Baugh*, nor at any time before, had cause of action against the aforesaid *Baugh* within the jurisdiction of the said court; by reason of which unjust and malicious arrest and imprisonment of him the said *Baugh*, he the aforesaid *Baugh* not only in prison and custody by all the time aforesaid was detained and deprived of his liberty upon the pretended action aforesaid, for the damages aforesaid, but also compelled to undergo great labours, and to expend divers sums of money for his release, by the arrest and imprisonment aforesaid; whereupon the said *Baugh* says, that he is injured, and hath sustained damages to the value of fifty pounds; and thereupon he brings his suit, &c."

Upon issue joined they went to a trial, and the plaintiff had a verdict.

TREMAINE, *Serjeant*, now moved in arrest of judgment, that there was no reason (as he alledged) to ground an action on the case;

Hilary Term, 2. William & Mary, In B. R.

case; for though THE SHERIFF'S COURT had not an original jurisdiction of the cause, it being for rent due for a house and lands in the country, yet when the plaintiff was in the city, that court had a jurisdiction over his person. * Besides, he might have pleaded to the jurisdiction in that action, which was brought against him in THE COMPTER, which he had not done; neither did he alledge in this declaration that he was held to unreasonable bail; for if that had been so, there might have been some colour for this action; but upon the pleadings there is none. If a suit should be commenced for which there is but a *probable cause* of action, yet the defendant in such action shall not be entitled to another suit against the plaintiff (a). So if there be judgment against the defendant for a debt and damages, and before execution the money is paid to the plaintiff, who thereupon releases the defendant, and afterwards takes him in execution within the year, yet he shall not have an action for this vexation, but must bring an *audita querela* (b). So likewise if he take him in execution after the year it is erroneous; but an action will not lie; he must bring a writ of error.

BAUGH
against
KILLING-
WORTH.

* [14]

And for these reasons the judgment was stayed.

(a) 1. Roll. Abr. 102.

(b) Cro. Jac. 133.

Hodge against Clare.

Case 7.

SCIRE FACIAS was brought by John Hodge, as administrator to Alexander Hodge during the absence of Hannah Hodge, upon a judgment recovered in this court; upon which there was a writ of error brought in the exchequer chamber, and the judgment affirmed.

Demurrer to a scire facias by an administrator during absence.

The defendant demurred to the *scire facias*; and for cause shewed,

FIRST, It does not appear that any judgment was given in the exchequer chamber (upon which this *scire facias* is now brought) to have execution; for the words "*adjudicat. fuer.*" were left out.

A *scire facias* on a judgment, in which the words *adjudicat. fuer.* were omitted.

SECONDLY, It is not averred that Hannah was absent at the time of the administration committed to John Hodge, and so continued. THIS OBJECTION was answered by THE COURT, that the party ought to plead it (a).

A *scire facias* by an administrator *durante absentia*, must avow that the

executor, or next of kin, is absent. *Sed quæra.* 5 Co. Pigot's Case. 3. Keb. 212.

THIRDLY, That the administration was void, because of the uncertainty; for having prayed *oyer* of the administration, which being read *in hæc verba*, it appeared to be granted *durante absentia*, &c. and does not say from what place the person was ab-

If an administration be pleaded as granted *durante absentia*, it shall be intended an absence beyond the seas.

(a) In the case of Slater v. May, 6. Mod. 304. it is said, that the above report of this point of the case is not law, nor agreeable to the Roll; and in 6. C. 2. Ld. Ray. 1071. it is determined, that if an administrator *durante absentia* bring an action, he must shew in

his declaration that the executor, or next of kin, is *in partibus transmarinis*; and then said, that upon searching the Roll, in the above case, there appears a full averment that Hannah Hodge was *in partibus transmarinis*. See also Major v. Peck, 1. Lutw. 338.

sent.

HODGE
against
CLARE.

Letters of ad-
ministration
may be granted
to a stranger
during the ab-
sence of the next
of kin.

S. C. 1. Lutw.
342.
S. C. 2. Peer.
Wms. 579.
Fitzg. 202.
Ld. Ray. 265.
338. 409. 667.
824. 1071.
2216.

sent (a). * This was also answered by THE COURT, that it shall be intended out of the kingdom.

FOURTHLY, That it must be void, because the ordinary has no power to grant administration by the common law; the authority which he has is given to him by particular statutes. By the statute of 13. *Edw.* 1. c. 19. commonly called the *statute of Westminster the Second*, he has power to dispose of the estates of persons dying intestate. By the statute of 13. *Edw.* 3. c. 11. he has power to appoint administrators; and by the statute of 21. *Hen.* 8. c. 5. that power of granting administration, which before was too general, was now restrained to the wife or next of kin. Now if the ordinary exceed the authority given to him by these statutes, then this Court will prohibit him. But such an administration as this is not warranted by any of these laws, because it is directed to whom the administration of intestates estates shall go; but it is not appointed by any of these statutes, that it shall be granted to any one *during the absence* of another, and therefore the grant of this administration must be void. It would be very inconvenient if it should be otherwise in respect of debtors and creditors, because this administration is determinable upon the return of *Hannab Hodge* into *England*, of which all debtors must take notice at their peril; and it would be also very hard upon the creditors, who having commenced their actions against such administrators must then begin again.

But these objections were not allowed, for all of them may be made as well against an administrator *durante minore etate*, which is very like this case; and yet such an administration is held good, because it is in a manner granted to the right person, who has thereby good authority to receive the estate (b).

(a) This point of the case is confirmed by the opinion of the Court in the case of *Slater v. May*, 1. Salk. 42. 3. Salk. 23. 6. Mod. 304. 2. Ld. Ray. 1071. 3. Danv. Abr. 351. pl. 4.

(b) From a manuscript report of this case, produced by *Mr. Peter Williams* in the case of *Walker v. Woollaston*, 2. Peer. Wms. 579. it appears that *Mr. Pratt*, formerly Lord Chief Justice, was counsel in this cause; and that he objected it was a void administration, as it might end soon after it was granted, and yet neither the administrator himself nor any of the debtors to the estate of the deceased know when it ended, because the next of kin might return from beyond sea, and the administrator or the debtors of the deceased know nothing of it; that by this means the debtors of the deceased would be drawn in to make payments to the administrator after the next of kin returned, and consequently after the administration was determined; and that such an administrator *durante absentia* might be discouraged from bringing actions against the debtors of the deceased,

inasmuch as such action must abate by the return of the next of kin from beyond sea before the judgment, and the administrator lose his costs: But THE COURT adjudged such an administration granted *durante absentia* to be good; because, as stated 1. Lutw. 342. "it would prevent the grand inconvenience that must ensue, if the debts of the deceased could not be recovered during the absence of the executor beyond sea;" adding, "that if any of the debtors of the deceased paid his debt to such an administrator *durante absentia*, though it was after the return of the executor, yet if the debtor who paid the money had no notice of such return, it would be a good payment." S. C. 2. Peer. Wms. 580.—And in the case of *Slaughter v. May*, 1. Salk. 42. *HOLT, Chief Justice*, says, it is but reasonable that the ordinary should have power to grant administration *durante absence* as well as *durante minority* or *pendente lite*; and that such administrator is answerable to the executor. See the record of an action by an administrator during absence, 2. Salk. 751.

EASTER

E A S T E R T E R M,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* Jones against Beau.

• [16]

Cafe 8.

AN INDEBITATUS ASSUMPSIT was brought for the profits of the office of the chancellor to the *Bishop of Landaff*. The defendant pleaded *non assumpsit*, and this, being an issue directed out of of chancery, was tried at THE BAR.

What shall be sufficient evidence to prove an issue, "Whether the office of chancellor of a diocese had been usually granted to two persons, before the statute 1. Eliz. c. 19."

The bill was exhibited in that court by the now defendant for the books belonging to the office, and to quiet him in the possession thereof. At the trial in this court, the defendant, by order of the court of chancery, was to admit the receipt of the profits of the office to the value of five pounds, and was also to admit the copy of the patent under which the plaintiff at law claimed, and the confirmation of the dean and chapter. The patent was made in the year 1672, by *Francis David*, then *Bishop of Landaff*, by which this office was granted by him to *Dr. Lloyd* and the plaintiff *Jones*, and to the survivor, and that *Dr. Lloyd* was dead.

S. C. Post. 19. 27.
S. C. 2. Salk. 465.
S. C. 1. Show. 288.
S. C. Carth. 213.
S. C. 11. Mod. 10.
Carter, 213.
1. Burr. 225.

The point, therefore, now tried was, Whether it had been an usage in this diocese to grant this office to two? and it must be such an usage as was before the making the statute of 1. Eliz. c. 19. otherwise it will not warrant such a grant.

The

Easter Term, 3. William & Mary, In B. R.

JONES
against
BEAU.

The plaintiff produced four grants of this office to two persons, of which three were made in the time of one bishop, and the last was made in the year 1620, and no grant thereof afterwards to two, until this to *Dr. Lloyd* and the plaintiff *Jones*.

* [17]

* THE COUNSEL for the defendant thereupon insisted, that if the plaintiff had any title, it was gone by *non-user*; for the chancellor being a judicial officer, the *non-user* is a forfeiture of the office, it being for the administration of justice.

In *assumpsit* for profits of the office of chancellor, the bishop cannot give evidence of the usage of the diocese in support of the grant.

THE BISHOP, being in court, offered to be sworn to give evidence concerning the usage in his diocese, and that he had granted this office to one, &c.

But this was not allowed; for if the plaintiff has a good title, then the grant made by the bishop is void; and it was compared to a patron in an ejection, who is never permitted to be a witness to maintain the title of his clerk.

12. Mod. 40. 340. 372. 385. 512. Stra. 101. 652. 728. 828. 1043. Ld. Ray. 85. 91. 396. 507. 1008. 1411. 1. Term Rep. 262. 3. Term Rep. 308.

A grant of the office of commissary, made fifty years after 1. *Eliz.* c. 19. is good evidence to prove that it was usual to grant such office to two persons at the time of passing 1. *Eliz.* c. 19.

THEN IT WAS OBJECTED, that since the plaintiff had produced no grant to two persons but what was fifty years after the statute 1. *Eliz.* c. 19. it would be a very difficult matter to persuade the jury to take it upon their oaths, that the office was granted so before the making of the statute.

But PEMBERTON, *Serjeant*, answered, that these grants were only produced as evidence that such were made, there being no records extant relating to this matter before that time.

And DOLBEN, *Justice*, remembered *Ridley's Case*, concerning the office of *Register of Bristol*, wherein my LORD HALE was of opinion, that if it could be shewn that such grants were made some time after 1. *Eliz.* c. 19. it would be an evidence that such were also made before the statute.

If a special verdict find that an office has usually been granted to two ever since the 1. *Eliz.* c. 19. it shall be taken to have been so granted before the statute.

THE JURY found the matter specially, and the point upon the special verdict was, Whether the office of a chancellor, which hath been usually granted to two ever since the statute of 1. *Eliz.* c. 19. can be granted by law?

Ministerial offices, and also some judicial offices, created by statutes, may be granted to two persons, but an ancient judicial office cannot.

In the argument of this case it was admitted, that offices ministerial may be granted to two, and so may also some judicial offices which are established by act of parliament; but if such offices are of antiquity, then a grant made to two is void; and therefore if the office of prothonotary of the common pleas, or those of chief justice of either court, are granted to two, the patents are void, because they may differ in judgment, which would be a delay to justice: so here this grant may be of public injury; for if it be allowed to be good to two, then one may absolve, and the other may excommunicate.

4. Inst. 146.
18. E. 4. 7. b.
Cro. Car. 258.

Jones, 263. Winch. Ent. 22. Cases, T. T. 97. 140.

SECONDLY,

SECONDLY, This grant is void upon the statute of 1. Eliz. c. 19. which enacts, "That all lawful grants made by ecclesiastical persons of any office in old time wont to be granted, shall be good." * Now this cannot be a good grant, if the office have not been usually granted to two in old time, which is not found by the verdict, for there was no evidence to that purpose.

JONES
against
BEAU.

Wherever the office of commissary was usually granted to two persons before 1. Eliz. c. 19. the bishop may continue to grant it to two persons.

E contra it was argued, That the grant of this office is good; it is like the grant to two sheriffs; or of the auditor's place of the court of wards (a), when that court was in being, which was partly a judicial office. It is not void at the common law; and, if so, the statute of 1. Eliz. c. 19. makes no alteration as to this case; for that restrains bishops from making "grants of lands, tenements, and hereditaments, being part of the possessions of their bishopricks, other than for twenty-one years or three lives, from the time of such grant, which has been usually demised, and whereupon the old accustomed rent, or more, shall be re-served." But a grant of an ancient office, in such manner as it has been accustomed to be granted, is out of that statute; the makers whereof chiefly regarded the revenue of the successor, that he might have sufficient to maintain hospitality, and to repair the dilapidations of the church, if any such should be; which might not be done, if the acts of his predecessor should bind him. But this is an ancient office, and being grantable to two, it cannot be a diminution of the revenue of the successor (b), and therefore it must be exempted out of the statute.

10. Co. 61.
Bridg. 31.
Cro. Car. 48.
258.
Jones, 264.
Skin. 104.

CURIA. Nothing can support this grant but *usage*: and there being enough found to induce the Court to be of opinion, that this office was anciently granted to two before the statute, THEY HELD this grant good; and judgment was given for the plaintiff (c).

Afterwards the defendant Beau libelled against Dr. Jones in the spiritual court, for his ignorance in the canon and civil laws, the knowledge whereof, as he suggested, was required in a chancellor; whereupon Dr. Jones brought a prohibition as follows:

(a) Auditor Curl's Case, 11. Co. 3.

(c) See the case of Sir John Tre-

(b) Bridg. 29. Cro. Car. 47. lawney v. The Bishop of Winchester, 1. Burr. 219.

* Jones against the Bishop of Landaff.

* [19]

Case 9.

Easter Term, 3. Will. & Mary. Roll 444.

GULIELMUS EPISCOPUS LANDAV. *sum. fuit ad respondend.* JOHAN. JONES *Legum Doctori* vicar. in spiritualib. *general. et cur. consistor. episcopal. dioces.* LANDAV. *official. principal. qui tam pro domino rege et domina regina quam pro seipso sequitur de placito quare secus. est placitum in Curia Christianitatis contra prohibition. dict. domini regis et dominæ reginæ ei prius inde in contrarium direct. et deliberat.* Et unde idem JOHAN. JONES qui tam, &c. per JOSUAM MORRIS attorn. *sum queritur quod cum officium vicar.*

Action for suing after a prohibition.

Easter Term, 3. William & Mary, In B. R.

JONES
against
THE BISHOP OF
LANDAFF.

The office of
Vicar General,
or Chancellor,

grantable to
two persons for
life.

Grant of the of-
fice.

* [20]

Habendum.

Confirmed by
the dean and
chapter.

in spiritual, general, sive cancellar. principal. official. EPISC. LANDAVEN. præd. est antiquum officium ac à tempore cujus contrar. memoria hominum non existit quandocunque officium illud acciderit vacuum esse prædict. officium concess. et concessibile fuit et dari et concedi consuevit per EPISCOPUM LANDAVEN. pro tempore existens. alicui personæ idone. pro termino vitæ suæ seu aliquibus DUABUS PERSONIS idoneis conjunctim et divisim pro termino vitarum suarum et vitæ alterius diutius viventis ac secundum hujusmodi concessionem habit. et graviss. fuit juxta formam et effectum hujusmodi concession. cumque officium prædict. fuit vacuum. Ac superinde FRANCISCUS, nuper EPISCOPUS LANDAVEN. 7 die Septembris, anno Domini 1671, apud LONDON. prædict. videlicet in paroch. beatæ Mariæ de Arcubus in warda de Cheape per quasdam literas suas patentes sigillo suo episc. sigillat. per eundem JOHANNEM qui tam, &c. hic in curia prolat. geren. dat. eisdem die et anno pro diversis bonis et legitimis causis et considerationib. ad animam suam in ea parte specialiter mouen. dedisset, concessisset, et confirmasset pro seipso et successoribus suis EPISCOPIS LANDAVEN. dilecto sibi in Christo RICHARDO LLOYD, Legum Doctor. un. advocat. r. almæ Curie Cantuar. de Arcub. London. et præd. JOHANNI JONES qui tam, &c. per nomen JOHANNIS JONES Artium Magistri et Collegii J. J. Oxon. socii et eorum utrique conjunctim et divisim et eorum alteri diutius viventi (ipsis RICHARDO LLOYD et JOHAN. JONES personis idoneis ad officium illud bend. existen.) prædictum officium vicar. in spiritualibus general. et official. principal. in et per totam civitat. dioces. et jurisdiction. Landaven. præd. et præsiden. Curie EPISCOPAL. LANDAVEN. prælabilibet infra dioces. præd. constitut. sive constituend. eosq. et eorum utrumque conjunctim et divisim vicar. in spiritualibus general. et cur. consistorial. episcopal. Landaven. præd. official. principal. constitut. præfecit habend. exercend. tenend. et gaudend. præd. officium et officia ac etiam omnia et singula præmissa cum suis pertinen. quibuscunq. præfat. RICHARDO LLOYD et JOHANNI JONES qui tam &c. conjunctim et eorum utriq. per se divisim et eorum diutius viventis per se aut deputat. aut surrogat. suos sufficientes quoscunque sine impedition. impedimento aut molestia sua vel alicujus successorum suorum EPISCOPOR. LANDAV. prædict. una cum omnibus et singulis feudis vadiis profe. commoditatib. emolumentis et honorariis quibuscunq. ad officium præd. spectan. et pertinen. ac ratione et intuitu præmissorum vel eorum aliquorum de jure consuetudine vel alio quocunque modo d. bit. et solvi consuet. a tempore concession. literarum paten. præd. pro et duran. termino et terminis vitarum naturalium eorundem RICHARDI LLOYD et JOHANNIS JONES et eorum utriusq. diutius viven. Quam quidem concession. præfat. RICHARDO LLOYD et JOHANNI JONES qui tam, &c. in forma præd. fact. et omnia et singula in eadem content. postea scil. primo die Martii anno domini 1671. supradict. per Decanum et Capitul. Landaven. apud London. prædict. in parochia et warda prædict. per quoddam scriptum suum confirmationis sigillo suo Capitul. sigillat. quod idem Johannes qui tam, &c. hic in curia proferi geren. dat. est eisdem die et anno in vita præfat. FRANCIS. tunc LANDAVEN. EPISC. præd. existen. ac in vita præfat. RICHARDI LLOYD modo defunct. ratificaverunt et confirmaver. Virtute quarum quidem literarum patent.

ac confirmation. inde sit ut præfertur, fact. prædict. RICHARDUS LLOYD et JOHANNES JONES qui tam &c. furr. de officio prædicto cum totis feodis proficuis perquisit. et pertinen. adinde spectan. seisit. ut de libero tenemento pro termino vitarum suarum et vitæ eorum alterius diutius viventis. Et sic inde seisit. existen. idem RICHARDUS LLOYD postea scilicet decimodie Decembris, anno Domini 1686, apud Lond. n. præd. in paroch. et warda præd. obiit de tali statu inde seisit. et præd. JOHAN. JONES ipsum supervix. Post cujus mort. idem JOHAN. JONES qui tam, &c. fuit de officio præd. solus seisit. ut de libero tenemento per jus accrescendi, &c. ac sic officium illud cum omnibus feodis proficuis et pertinen. adinde spectan. gaudere et habere debuit et debet virtute concession. et confirmation. præd. cumque omnia et singula placita et negotia tangen. et concernen. liberum tenement. ac jus et titulum aliquarum terrarum officiorum et hæreditament. ac validitat. interpret. vigorem vel effectum aliquorum donorum concession. sue confirmation. infra hoc regnum Angliæ fact. ac etiam interpretation. chartarum et concession. ad dominum regem et dominam reginam nunc et coronam suam regiam et non ad Curiam Christianitatis ullo modo spectant. et pertinent. ac per leges terræ hujus regni Angliæ in curia domini regis et dominæ reginæ de record. coram ipsis rege et regina vel justitiariis suis curiarum illarum ac judicibus secular. et temporal. et non in Curia Christianitat. nec per jur. sive censuras ecclesiastic. ullo modo triari terminari et discuti debeant et semper hætenus consuever. et debuer. præd. tamen GULIELMUS mo. lo LANDAVEN. EPISC. præmissorum non ignarus et leges hujus regni Angliæ minute ponderans ac illas violare proponens et machinans præd. JOHANNEM JONES qui tam, &c. contra leges et statuta hujus regni Angliæ indebite prægravare opprimere et fatigare necnon jus statum titul. et interesse ipsius JOHANNIS JONES qui tam, &c. in et ad officium præd. evacuare et vim validitatem concession. et confirmation. officii præd. in forma prædicta fact. per callidas assertiones et allegationes in hac parte fact. in Curia Christianitat. triari et terminari eundemque JOHANNEM JONES qui tam, &c. ab executione officii præd. ac feodis et proficuis officio prædict. spectan. et pertinen. bend. et percipiend. amoveri deprivari et excludi causare necnon dictum dominum regem et dominam reginam nunc et coronam suam regiam exhæreditare cognitionemque placiti quæ ad ipsos dominum regem et dominam reginam nunc in hac parte et coronam suam regiam et non ad Curiam Christianitat. ullo modo spectat et pertinet ad adiudexamen in Curia Christianitat. trahere ipsum JOHANNEM JONES qui tam, &c. in Curia Christianitat. coram GEORGIO OXENDEN * Legum Doctore, almæ curiæ Cantuar. de Arcubus London. official. principal. legitime constitut. scil. apud Lond. n. præd. in paroch. et warda præd. tent. post concession. et confirmation. in forma præd. fact. de super et concernen. validitate ejusd. concession. et confirmat. ac præd. jus statum et titulum ipsius JOHANNIS JONES qui tam, &c. de et in officio præd. traxit in placitum ac versus ipsum JOHANNEM JONES qui tam, &c. ibidem diversos articulos exhiberi et obijci causavit quorum quidam articulorum tenor sequitur in hæc verba scilicet, Imprimis objicimus et articulamus against you the said Dr. John Jones, that whereas you do execute the office of chancellor, and do

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* [21]
One of the
Grantees died.
The other sole
seised.

* [22]
Traxit in placitum.

and exhibited
articles in hæc
verba.

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exercise ecclesiastical jurisdiction, by virtue thereof, within our diocese of Landaff; and whereas the laws ecclesiastical of this realm positively require and direct, that *nullus ad officium cancellar. commissar. aut official. admittetur ad jurisdictionem. quamlibet exercend. nisi qui in jure civili et canonico eruditus existat sitque in praxi et causis forensibus laudabiliter exercitatus*, you the said Dr. John Jones do exercise the office of chancellor and principal official and ecclesiastical jurisdiction in our diocese of Landaff, and are not *in jure civili et canonico eruditus nec in praxi et causis forinsecis laudabiliter exercitatus*, nor have applied yourself to the study and practice of the civil and canon laws, as required by the said ecclesiastical laws; but have wholly applied yourself for near twenty years last past, and do still, to the study, practice, and exercise of physic, whereby great prejudice and detriment may and doth arise to the public, *et objicimus et articulamus ut supra*. ITEM *objicimus et articulamus* against you the said Dr. John Jones, that you appointed deputies not skilled in civil or canon law.—3. That he was absent for the most part from Landaff, where the consistory court ought to be kept, and did not provide a surrogate to be resident there.—4. That he left his chancellor's seal with one Philip Maddox the register, and sometimes with his wife; whereas it ought to be kept by himself or deputy.—5. That he absolved William Cornish and his wife from a sentence of excommunication for a clandestine marriage, and had taken money by way of commutation of penance.—6. The ecclesiastical laws require, that a minister who marrieth persons clandestinely, shall be suspended *ab officio et beneficio* for three years, and a person so decreed suspended you in a few weeks * after absolved.—7. For menacing the bishop's apparitors in serving a summons.—8. For declaring the bishop's servant excommunicate for serving a monition under the episcopal seal.—9. For absolving one whom the bishop had excommunicated.—10. That he refused an apparitor appointed by the bishop to exercise his office by a deputy, and appointed another in his room.—11. For reserving and prohibiting the register to send the book of Acts and Entries, that the bishop might inspect the irregularities in some proceedings in the consistory court.—12. For issuing out public instruments in his own name; JOHANNES JONES *Legum Doctor Reverendi in Christo patris GULIELMI permissione divina Landaven. Episc. vicarius in spiritualibus generalis et official. principalis legitime constitut. universis et singulis clericis et literatis in et per totam nostram Landaven. dioces. &c.*—13. That licensing of curates and apparitors was excepted out of his patent, yet he hath exercised jurisdiction contrary to the patent.—14. By licensing proctors and apparitors, &c.—15. Who have acted after monition given to you.—16. That he hath displaced persons appointed by the bishop to act as apparitors and proctors.—17. That he cited all school-masters and curates who acted without licence to appear before him, and to take licences, notwithstanding the restraining clause in his patent, whereby that power is reserved to the bishop.—18. That he granted a licence
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for *Evan Rees* to marry *Mary Tanten*, being under the age of twelve years, and an heiress, without the consent of her tutor or guardian.—19. That he granted administration to one, and afterwards, without revoking it, granting a probate of a nuncupative will of the same person to another as executor.—20. That he granted licenses to school-masters contrary to his patent.—21. ITEM quod dictus JOHANNES JONES Legum Doctor fuit et est diocef. Landaven. Cantuar. provinciæ eiq. intuitu ac ratione hujus litis jurisdiction. hujus curiæ notorie subditus et subjectus, et ponit ut supra. Item quod de et supra præmissis, &c. ITEM objicimus et articulamus quod præmissa omnia et singula sunt vera dictumq. doctorem JOHANNEM JONES propter temeritatis suæ excessum in præmissis necnon propter insufficientiam et ignorantiam suam antedict. canonice puniend. ac ab officio suo prædicto amovend. fore et debere pronunciamus, &c. GULIELMUS LANDAVEN. prout per eosdem articulos in prædicta Curia Christianitatis coram præfat. GEORGIO OXENDEN residen. et veram copiam inde in curia hic prolat. plenius liquet et apparet præd. GULIELMUS LANDAVEN. episc. eundem JOHANNEM JONES qui tam, &c. in præd. Cur. Christianitat. coram prædict. GEORGIO OXENDEN occasione articulorum præd. comparere minus juste asinxit ac eundem JOHANNEM JONES qui tam, &c. de et in præmissis condemnari ac de et ab officio præd. per definitivam dict. Cur. Christianitat. sententiam deprivari totis suis viribus conatur et indies machinatur; ac licet breve dictorum domini regis et dominæ reginæ de prohibitione præfat. GEORGIO OXENDEN et al. judicibus in hac parte competentes. vicesimo die Novembris anno regni dictor. domini regis et dominæ reginæ nunc quinto apud London. præd. in parochia et warda præd. in contrar. inde directi. et deliberat. fuit, idem tamen GULIELMUS EPISCOPUS LANDAVEN. placitum prædict. post prohibitionem. regiam prius in contrar. inde in forma præd. directi. et deliberat. scilicet vicesimo primo die Novembris anno regni dictor. domini regis et dominæ reginæ nunc quinto supradict. apud London. prædict. in paroch. et warda prædict. ulterius prosecut. fuit et in placito illo processit (dicto brevi dict. domini regis et dominæ reginæ de prohibitione præfat. judicibus in spiritualibus prius in contrarium inde in forma prædicta directi. et deliberat. non obstante) in dict. domini regis et dominæ reginæ nunc contemptum et ipsius JOHANNIS JONES qui tam, &c. damnum præjudicium depauperation. et gravamen manifestum ac contra leges hujus regni Angliæ; unde idem JOHANNES JONES qui tam, &c. dicit quod ipse deteriorat. est et damnum habet ad valentiam centum librarum, et inde produc. sectam, &c.

* [24]

Et præd. GULIELMUS LANDAVEN. EPISC. per BEZALEEL KNIGHT attorn. suum venit et defendit vim et injuriam quando, &c. et omnem contemptum et quicquid, &c. et dicit quod ipse non securus fuit placitum præd. versus præd. JOHANNEM JONES in Curia Christianitatis contra prohibitionem dictorum domini regis et dominæ reginæ prout idem JOHANNES JONES qui tam, &c. superius supposuit: et de hoc ponit se super patriam. Et. præd. JOHANNES JONES qui tam, &c. similiter, &c. Sed pro brevi domini regis et dominæ reginæ de consultation. quoad placitum præd. super primum articulum in

The defendant pleads, that he did not prosecute after the prohibition and issue thereupon.

Sed pro consultatione habend. he demurs.

narratione prædict. mentionat. et quoad materiam in eodem content. habend. idem GULIELMUS EPISC. LANDAVEN. dicit quod narratio * præd. quoad præd. primum articulum et materiam in eodem primo artic. content. minus sufficiens in lege existit ad ipsum GULIELMUM LANDAV. EPISC. ad inde respondere compellend. ad quam idem EPISC. necesse non habet nec per legem terræ aliquo modo tenetur respondere, unde pro defectu sufficiens. narration. in ea parte idem EPISC. petit judicium de narratione. præd. quoad præd. primum articulum ac quod breve dictorum domini regis et dominæ reginæ de consultatione in ea parte quoad eundem primum articulum concedatur, &c. Et pro brevi de consultatione quoad resid. articulorum præd. in narratione prædict. mentionat. habend. idem EPISCOPUS ulterius dicit quod per et secund. canones et leges ecclesiasticas in regno Angliæ usitat. et approbat. omnia et singula offensæ crimina et materiæ in eisdem articulis mentionat. sub periculo quarundam ecclesiasticarum censur. prohibet. sunt et diversis ecclesiasticis censuris punibil. existunt necnon per easdem leges coram ecclesiasticis iudicibus in ea parte competentibus et non alibi triari examinari et puniri solent et debent quodq. in vel per eosdem resid. articul. vel prosecution. eorundem vel alicujus eorum in Curia Christianitatis jus sive titulus ad vel in officio præd. in narratione præd. mentionat. triari examinari vel in quæstione redigi minime possit. Itemq. EPISCOPUS ulterius dicit quod ipse idem EPISCOPUS eundem JOHANNEM JONES in Curia Christianitat. præd. videlicet apud London. præd. in parochia et warda præd. prosecutus fuit super eosdem resid. articulos prædictos in ordine ad canonicam punitionem et ecclesiasticas censuras in ea parte debitae et minime per deprivation. seu exclusion. ab officio prædicto pro causis in eisdem articulis residuis super eundem JOHANNEM JONES infligend. et adhibend. Et hoc idem EPISCOPUS paratus est verificare. Unde petit judicium et breve dictorum domini regis et dominæ reginæ de CONSULTATIONE quoad præd. residuum articulorum sibi in hac parte concedi.

BARTH. SHOWER.

Replication.

Et prædictus JOHANNES qui tam, &c. dicit quod per aliqua per prædictum GULIELMUM EPISCOPUM LANDAVEN. superius placitando allegat. narratio ipsius JOHAN. qui tam, &c. cassari minime debet nec breve dictorum domini regis et dominæ reginæ de consultatione quoad primum articulum in narratione præd. mentionat. præfati GULIELMO EPISCOPO LANDAVEN. concedi debet, &c. quia dicit quod narratio illa quoad præd. primum * articulum materiaq. in eadem content. bona et sufficiens in lege existunt ad præd. GULIELMUM EPISCOPUM LANDAVEN. ad narrationem illam (quoad prædictum primum articulum) respondere compellend. ac ad breve dictorum domini regis et dominæ reginæ de prohibitione in forma prædicta concessa manutenend. quam quidem narration. quoad præd. primum articulum materiaq. in eodem content. idem JOHANNES qui tam, &c. parat. est verificare et probare prout Curia, &c. Et quia præd. EPISCOPUS ad narrationem illam quoad præd. primum articulum non respondebat, nec ille bucusq. aliquo modo dedicit idem JOHAN. qui tam, &c. pet. judicium et damna sua præd. sibi adjudicari, &c. Et idem JOHAN. JONES ulterius dicit quod præd. GULIELMUS EPISC. LANDAV. brev.

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breve dictorum domini regis et dominæ reginæ de consultat. quoad resid. articulorum in narrat. præd. mentionat. habere non deb. quia dicit quod placitum præd. per ipsum GULIELMUM EPISCOP. LANDAV. (quoad resid. articulorum in narratione præd. mentionat.) modo et forma præd. superius placitat. materiaq. in eodem content. minus sufficien. in lege exist. ad præd. breve dictor. domini regis et dominæ reginæ de consultatione impetrand. ad quod idem JOHANNES qui tam, &c. necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc parat. est verificare. Unde pro defectu sufficien. responsi. in hac parte idem JOHANNES qui tam, &c. petit judicium et damna sua præd. sibi adjudicari, &c. Et pro causis mration. in lege juxta formam statuti in hujusm. casu nuper edit. et provis. idem JOHANNES qui tam, &c. Cur. demonstrat et ostendit quod apparet per articulos in narratione præd. mentionat. quod præd. GULIELMUS EPISCOPUS LANDAVEN. ob offens. præd. in separatibus articulis resid. articulor. præd. express. conat. eundem JOHANNEM JONES qui tam, &c. ab officio præd. deprivari et amovend. fore.

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Et prædict. EPISCOPUS LANDAVEN. dicit quod placitum præd. per ipsum (quoad resid. articulor. in narratione præd. mentionat.) in forma præd. materiaq. in eodem content. bonum et sufficien. in lege existunt ad breve dictor. domini regis et dominæ reginæ de consultatione concedend. et habend. quod quidem placitum (quoad resid. articulor. præd.) idem Episc. parat. est verificare et probare prout Cur. &c. Et quia præd. JOHAN. JONES qui tam, &c. ad placit. illud non respond. nec illud bucusq. aliquatit. dedit idem EPISC. pet. judicium et breve dictor. domini regis et dominæ reginæ de consultat. (quoad resid. articulor. præd.) sibi in hac parte concedi, &c. Sed quia Cur. &c.

* Jones against the Bishop of Landaff.

* [27]

Cafe 10.

THIS CASE was argued in Michaelmas Term in the sixth year of this king; and it was shortly thus:

The Spiritual court shall be prohibited from proceeding in a suit by a bishop against the chancellor of his diocese to deprive him for ignorance in the civil and canon laws, although the office was granted by his predecessors; for being granted for life, the grantee has a freehold in the office.

In a prohibition the plaintiff declared, that the office of chancellor of the bishop of Landaff was an ancient office, and that as often as it became void, the bishop of that see for the time being used to grant it for one or two lives, and to the survivor of them; that, the said office being void, Francis David late bishop of Landaff did grant the same to Dr. Lloyd, and to the plaintiff John Jones, to have and to hold the same to them, and to the survivor for life; that Dr. Lloyd was dead, and the plaintiff survived, by reason whereof he was entitled to the said office; that the interpretation of all grants did belong to the king's courts, and not to the spiritual courts; that the defendant had sued the plaintiff in the ecclesiastical court, and had exhibited articles against him before Dr. Oxenden, that he was ignorant in the canon and civil laws, that he had made deputies who were unlearned in the said laws, &c.; and that the premises were true; and so prayed that Dr. Jones might be removed from the said office for his insufficiency; that

S. C. 12. Mod. 47.

Jones, 393. Ray. 88. Latch. 225. 2. Roll. Abr. 286. Fitz. 190. 273. "Prohibition" (F. 4.)

6. Com. Dig.

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the said *Dr. Jones* was compelled to appear in the said court to answer those articles; and that the defendant endeavoured to deprive him from that office by a definitive sentence in that court, contrary to a prohibition, &c.

The bishop pleaded, that he had not prosecuted the plaintiff in the spiritual court against a prohibition, and demurred upon the first article.

The plaintiff joined in the demurrer.

The bishop, as to the rest, pleaded, that all the crimes contained in the other articles are prohibited by the canon law, and ought to be punished by ecclesiastical censures, &c.

The plaintiff demurred.

* [28]

And IT WAS ARGUED in his behalf, that a *consultation* ought not to be, because it was a suit merely for deprivation; and for that reason, if there was no other, the ecclesiastical court ought to be prohibited. This office is a matter of freehold, which cannot be determined either by the canon or civil laws; and therefore it has been held that an *assize* will lie for the office of the *Register of the Court of Admiralty*, which is a freehold for life; for though the proceedings in that * court are according to the method and rules of the civil law, yet the right of that office is determinable at the common law (a). So if a question should arise concerning the validity of two patents by which the office of register to a bishop is granted, this shall not be tried in the spiritual court, notwithstanding the subject-matter is spiritual (b), because the office itself, being matter of freehold, is for that reason of temporal cognizance. In *Michaelmas Term, 29. Eliz.* a writ issued out of the court of admiralty, in the nature of a *scire facias*, to repeal letters patents by which the office of vice-admiral of two counties was granted to a particular person; and because this was triable at the common law, the Court gave a day to shew cause why a prohibition should not be awarded (c). Many more instances might be given of cases to this purpose. But in *Hilary Term*, in the eighth year of *James the First*, there was a dispute about the grant of this very office to two, viz. to *Dr. Trevor* and one *Griffin* (d); the doctor released all his right to *Griffin*, who died; then the bishop granted it to *Robotham*; and *Dr. Trevor*, pretending that he had a right by survivorship by virtue of a former grant, made a substitute, who was disturbed by *Robotham* the new grantee; whereupon an inhibition was granted in THE ARCHES: and it was agreed by all the Court, that though the office was spiritual as to the exercise, yet as to the right it was temporal, and the party having a freehold in it, made it determinable at the common law. The case of *Dr. Sutton* is the single authority against the plaintiff.

(a) 8. Co. 47. b. Dyer, 152.

(b) 2. Roll. Abr. 285. pl. 37.

(c) 3. Leon. pl. 237.

(d) 2. Brownl. 11. 2. Roll. Rep.

306. Cro. Car. 55.

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It is reported in several books (a). He was chancellor to the *Bishop of Gloucester*, and articles were exhibited against him before ecclesiastical commissioners, for that by divers canons no person ought to be admitted to that office but such who was learned in the canon and civil laws; he pleaded that he had a freehold in the office for life, and ought to enjoy the same, and so prayed a prohibition; but it was denied, and the reason given was, because the commissioners might deprive him for insufficiency. It is true, the Judges of the ecclesiastical courts, and not those of the common laws, are the proper judges of the abilities of a chancellor (b), and therefore they may examine him as *Dr. Sutton* was examined; but at that time the high-commission court extended its power too far in many cases of deprivation; for it cannot be denied but *Dr. Sutton* had a freehold in that office. It * was the opinion of *CROKE, Justice*, who reported that case (c), that *the Doctor* might have an *assize* to try it if he had any wrong done, which shews he had a freehold; and if so, then admitting the spiritual court can try the sufficiency of a chancellor, yet if the temporal courts have also in the same case a jurisdiction in respect of the freehold, the authority of the ecclesiastical court shall be ousted. To prove this, *Sir Timothy Hutton's Case* (d) was cited, who obtained a monition from the *Archbishop of York* to the *Bishop of Chester*, who, as ordinary, had refused the clerk presented by *Sir Timothy*; which monition was, that the *Bishop of Chester* would either admit the person, or appear before the archbishop, &c. He did neither, and thereupon the clerk was instituted by the archbishop, and inducted by his warrant; and afterwards a suit being commenced before the delegates, because the institution was granted in *London* out of the diocese of *York*, and by consequence the induction would be void, the court of common pleas was of opinion to prohibit the suit; for though the institution was spiritual, yet the induction, being a temporal act, shall draw the trial to the common law, otherwise the right of patronage would be tried in the ecclesiastical courts, and a *quare impedit* would seldom or never be brought. If the plaintiff was insufficient, it might create an original incapacity, so as to avoid the grant; but it is not material whether he himself is learned or not in the canon or civil laws, because the office is granted to him to exercise by himself or deputy; and no man will deny but he may constitute a deputy learned in those laws; and if he do make an ignorant one, it is a forfeiture of his office. There are some other causes by which he might incur a forfeiture, as non-attendance, &c. as well as the insufficiency, but that is not alledged. It is true, that inability has been laid to his charge, and the bishop made a new grant to try the title at law, and there was a verdict against his

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10. Mod. 12.
64. 264. 385.
440.
FITZ. 123. 180.
194.
Ld. Ray. 323.

* [29]

(a) Latch. 228. Noy, 91. Cro. Car. 65. Palm. 450. But see 12. Mod. 47. where it is said, that this case was denied to be law. See also 1. Burn. Eccl. Law, 3. edit. p. 268.

(b) 2. Roll. Abr. 286. pl. 39.

(c) Cro. Car. 65.

(d) Hob. 15.

grantee,

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grantee, and now he seeks for remedy in the spiritual court upon the same pretence which he had at law, and therefore ought to be prohibited.

• [30]

Those who argued *on the other side* held, That all the articles exhibited against the plaintiff were of ecclesiastical cognizance; and therefore the proceedings there ought not to be stopped by the temporal courts. * This very thing has been formerly complained of by *Archbishop Bancroft*, who exhibited articles to the lords of the council of *King James the first*, in the name of the whole clergy, against the Judges in *Westminster Hall*, for granting prohibitions to suits in the spiritual courts for deprivations of ministers for insufficiency (*a*), because those courts have the proper judicature of the learning and sufficiency of the person; and if prohibitions should be granted in such cases, this inconvenience would follow, that the knowledge of a man in the canon and civil laws must be tried by a jury, which seems to be very absurd. There is a difference when a suit is commenced in these courts for deprivation, which is a thing of ecclesiastical cognizance, and when it is begun for a thing purely temporal: now in this case the qualification of the person is the matter which is first enquired into; but all the authorities cited on the other side where prohibitions have been granted, were concerning temporal things, as grants, &c. which must be tried at law. If the king should grant an office in this court, it will not be denied but that the Judges may remove such an officer for insufficiency, because they are proper persons to judge of his abilities. No instance can be given where prohibitions have been granted for things merely of spiritual cognizance, but always where the matter was temporal. It is true, the articles now exhibited do suppose the plaintiff to have a grant, and to be in possession of the office; but they further alledge, that he ought not to enjoy it by the law of the land, because of his insufficiency in the knowledge of the canon and civil laws; for which reason he is to be censured by the archbishop, who is to take care that all the canons should be executed which are not repugnant to the common law: and by the 27th canon, made in the reign of *King James*, no man is to execute the office of a chancellor, unless he is skilled in these laws, for he is obliged to act in his office by them. Many instances may be given wherein this Court has been very tender in granting of prohibitions even in cases where the person concerned has not been subject to the jurisdiction of the spiritual courts; as an incumbent of a donative was cited there for marrying without a licence (*b*). Now no man will say that he is subject * to the jurisdiction of the ordinary, yet the matter for which he was cited being of spiritual cognizance, a prohibition was denied. So likewise a *mandamus* was denied to the DEAN OF THE ARCHES by the court of king's bench, to restore a person to the office of proctor (*c*), though he is an

Fitzg. 189.
Ld. Ray. 123.
212. 236. 265.
323. 587. 507.

• [31]

(a) Michaelmas, 3. Jac. 1. 2. Inst.
614.

(b) 1. Mod. 12.

(c) 3. Lev. 309. 3. Mod. 332. 1.
Show. 217. 251. 261. Skin. 290.

officer

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officer of whom the common law takes notice, and is likewise mentioned in several acts of parliament. But if a prohibition should be granted in this case, it should be only *quoad* the matter triable at law (a); for where a suit is begun in the ecclesiastical court for two things, whereof one is of spiritual cognizance and the other temporal, and if by the sentence to be given in such case the punishments would be so intermixed that it cannot stand for one unless for both, there a prohibition has been granted; but if it be severed, then it ought to go to that matter which is triable at law. If this person should fall under a temporary disability, as lunacy, &c. the bishop may put in another; and so he may for any other disability.

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Upon these reasons a *consultation* was prayed: but THE COURT inclined against it (b).

(a) 2. Roll. Abr. 390. pl. 6. 314.
pl. 1.

(b) See Newcomb v. Higgs, Fitg.
189.

The King and Queen against Evans.

THE *custos rotulorum* of a county was displaced, and another constituted in his room, to whom the defendant, being *clerk of the peace*, refused to deliver THE ROLLS.

He was indicted for this misbehaviour, and found guilty, and thereupon was removed from his office.

He now brought a *mandamus* to be restored; and all this matter being returned, a motion was made to maintain this return.

And it was said, that a *clerk of the peace* is a ministerial officer to the *custos*, and ought to deliver THE ROLLS to him at the end of every sessions: it is true, he has a more fixed estate in his office than the *custos* has, but still he is but his deputy, and is to be removed by a charge exhibited to the justices in writing.

* THE CHIEF JUSTICE. The clerk of the peace ought to make out all the *process*, which cannot be done without THE ROLLS. When they are completed, then he must deliver them to the *custos*; but as long as they are in process, they are to be with the *clerk of the peace*; and therefore it seems reasonable that the defendant should be restored.

But THREE JUDGES were of a contrary opinion (a).

(a) By the statute 1. Will. & Mary, c. 21. it is enacted, "That if any *clerk of the peace* shall mis demean himself in the execution of his office, and thereupon a complaint and charge, in writing, of such misdemeanor shall be exhibited against him to the justices, in their general quarter sessions, they may, upon examination and due proof, suspend or discharge him from his said office." It appears by the report of this case by Sir B. Shower, that Evans had been removed by an order of sessions

under this statute; and that the Court granted a *peremptory mandamus* to restore him to his office, because it only appeared, on the return to the *mandamus*, that articles had been exhibited against him, and not a complaint and charge in writing, pursuant to the statute. S. C. 1. Show. 259. ; and it seems by S. C. 12. Mod. 13. as well as by the principal case, that if on a formal complaint the sessions remove a clerk of the peace without cause, the Court of King's Bench will restore him.

Case 11.

A *mandamus* lies to restore a *clerk of the peace* improperly removed by the session, under 1. Will. & Mary c. 21.

S. C. 1. Show. 282.

S. C. 12. Mod.

3.

5. Mod. 386.

Carth. 426.

Stra. 997.

Ld. Ray. 153.

* [32]

4. Com. Dig.

"Justice of the

"Peace" (D.

5.)

TRINITY

TRINITY TERM,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

} *Justices.*

• The City of Exeter *against* Glide.

• [33]

Cafe 12.

MANDAMUS to restore the defendant to the places of
ALDERMAN and CHAMBERLAIN of the city of *Exeter*.

The substance of the return was, that the city is an ancient city and body politic; that the mayor thereof is an ancient officer; that there are twenty-four aldermen, and so many citizens there, who have used to be of the common council and had a court there, &c.; that the defendant, being an inhabitant of the said city, was chosen alderman thereof, and as such was a justice of the peace, which is an office of trust and magistracy; that he being so chosen, *recessit, elongavit, et habitationem suam reliquit et deseruit, et amovebat seipsum et familiam suam ad TOPSAM extra civitatem, &c.* such office, that he *recessit, elongavit, et habitationem suam reliquit et deseruit,* leaving forth wherein, and that he had notice of several courts held, but did not attend. — *Sed Q.* If he ought not to have had a *special summons* to answer the charges on which he was moved? — S. C. 1. Show. 364. S. C. 1. Comb. 197. S. C. Holt, 169. 435. S. C. 12. Mod. 27. 251. S. C. 1. Ld. Ray. 223. 1. Show. 258. 8. Mod. 102. 113. 151. 10. Mod. 101. 107. 146. 174. 11. Mod. 108. 214. 12. Mod. 3. 401. Fitzg. 293. Sira. 115. 674-997. 1235. Ld. Ray. 21. 186. 223. 481. 559. 564. 1237. 1267. 1283. 1304. 1348. 1379. 1405. 1479. Com. Rep. 86. Dougl. 155.

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forty times in three years; that when he was present he gave scurrilous and reproachful language to the court, for which he was removed from his said office (a); and that he could not be restored, because he had not taken the oaths before the first day of August 1691, according to a late act of parliament, &c. (b)

* [34]

* Those who argued for the defendant and against the return said, that it was insufficient as to the matter returned; and that the first part thereof was not good for three reasons.

FIRST, Because it is not alledged that *Topsam* was *extra libertates civitatis*; for it may be *extra civitatem*, and yet within the liberties of the city. Besides, if it had appeared that *Topsam* was *extra civitatem*, yet the defendant removing thither did not give them cause to deprive him of his office, because it does not appear by the return that he was disabled from doing his duty by reason of his abode there, or that his attendance was necessary.

SECONDLY, It is not said that the defendant absented himself and removed his family without a reasonable cause, as sickness, &c. or how long he was absent.

THIRDLY, The next cause assigned was, that he *voluntarie neglexit* those things which appertained to his office as justice of the peace; this is too general, and a return to a *mandamus* ought to be as certain as a return to a *habeas corpus*; and therefore where the return of a *habeas corpus* was, that the party was committed for insolent behaviour and scurrilous words spoken at the council table, not mentioning what words, this was held insufficient (c). The like return of a commitment by the lords of the council for "divers misdemeanors" was held too general (d).

FOURTHLY, It is returned, that the defendant absented himself from several courts, &c. but it is not said that he was duly *summoned* to such courts; therefore it can be no cause of his removal; and the rather, because it appears that there were a sufficient number to hold those courts, and if there is no particular business, the absence of one justice of peace may be excused.

FIFTHLY, It is not said that any particular damage happened to the city by reason of the defendant's absenting of himself; and non-user of a private office without some special damage, is no cause of forfeiture (e).

(a) See *Rex v. Richardson*, Easter Term, 31. Geo. 2. that a corporation may remove an officer for good cause, although no such power is expressly given to it by charter, or belongs to it by prescription; for it is a power incident to a corporation. 1. Burr. 517. See also Ray. 439. 2. Stra. 819. Cowp. 502. Dougl. 149. (144.)

(b) See the 1. Will. & Mary, sess. 1. c. 8. f. 6.; and 2. Will. & Mary, c. 8. f. 12.

(c) *Chambers' Case*, Cro. Car. 133. See also 2. Hawk. P. C. 166. 170. 185.

(d) *Freeman's Case*, Cro. Car. 579. See also 2. Hawk. P. C. 165. 185. 186.

(e) Co. Lit. 233. a.

SIXTHLY,

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SIXTHLY, The next cause was, that he did publicly declare he would never meet again, which amounts to no more than a waiver of his office, which he may reassume at pleasure (a). THE CITY OF
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SEVENTHLY, Another cause of his removal was, for giving reproachful language to the mayor, &c. which might be a sufficient cause to bind him to the good behaviour (b), but not to * forfeit his office; and they ought to have returned the words spoken, that it might appear to the court of what nature and import they were. Ld. Ray. 777.
1030. 1566.
* [35]

EIGHTHLY, They return that he could not be restored, because he had not taken the oaths before the first day of August; but he is not obliged to it, for the statute requires it only of those persons who are in office: now it appears by the return, that he was not an officer then, for he was deprived.

NINTHLY, They have proceeded illegally, for they have deprived a man of his office upon a *general summons*, which is against law; the defendant ought to be *summoned specially* to shew cause why he should not be removed for such causes.

TREMAINE, *Serjeant*, and MR. ROE, who argued to maintain the return, answered these objections.

FIRST, It is returned that the defendant absented himself, and removed out of the city, and out of the county of the city, and it is not to be supposed that the liberties reached out of the city.

SECONDLY, It need not be returned, that he absented without a reasonable cause; for to be absent for debt may be a reasonable cause, but it is a sufficient cause to remove him.

THIRDLY, To absent himself *voluntariè* is not too general: for being absent, it is reasonable that another should supply his place, and a voluntary absence, without saying more, is a sufficient cause of forfeiture.

FOURTHLY, The most material objection is, that he absented himself, but was not *duly summoned*: now a summons is not necessary in this case, because there is no place appointed where notice ought to be given him. But admitting a summons to be necessary, he had sufficient notice, for it is returned that such a day a court was held, *et licèt sufficienter summonitus*, the defendant did not come. And to prove this, *Dr. Meriott's Case* (c) was cited, who, being one of the college of physicians, was summoned by the president to a court, and not coming, he was deprived. 12. Mod. 88.
10. Mod. 76.
101. 343.
Stra. 261.

The other objections were held to be immaterial.

But as to the last objection about taking the oath, it was said, that if the defendant should be restored upon a *mandamus*, it is a

(a) 3. Co. 26.

(b) *Bagg's Case*, 11. Co. 98.

(c) *Mich. Term, 23. Car. 2.*

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THE CITY OF new admission, though he may be in his old office and title, and
EXETER therefore ought to take the oaths (a).
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* [36]

But upon the whole matter there being a particular custom of the city alledged, that he must be an inhabitant * to be capable of this office, therefore *commorancy* goes through the whole case, and the office being for administration of justice is determined by *cesser* (b). Every custom which is reasonable is for that reason obligatory, and is rightly called *lex loci*; if therefore by this custom set forth upon this return, the defendant is to be an inhabitant of the city, then his departure from thence makes him want a legal qualification to be AN ALDERMAN of that place.

THREE JUSTICES were of opinion not to grant a *peremptory mandamus*; for they held, that amongst the many causes returned of the disfranchisement of this person, there was one sufficient, which they held to be, "that being an alderman and a justice of the peace of the city, &c. *habitationem suam deseruit et reliquit*, and did dwell at *Toplam*." It is incident to the duty and place of an alderman to be resident where he is chosen; his very name imports it; and removal makes him incapable of doing his duty where he ought: it is not a place of any profit, but of freedom and government of the city. It is said, that GLIDE "*deseruit et reliquit habitationem*," which must be intended a total desertion, and though he may return again it does not appear when, so it is uncertain; and yet it is a good return: for though there ought to be a convenient certainty, yet it is not requisite to be very precise (c). But supposing him to return again, it will not purge the forfeiture after a disfranchisement. It is like the case of tenant for life making a feoffment, and entering before the condition broken, notwithstanding which entry the reversioner may take advantage of the forfeiture.

But THE CHIEF JUSTICE was of another opinion; That a *mandamus* ought to go.

It was agreed, that *deserting his office* was good cause of disfranchisement (d); and so was *absenting himself* from the council; and that the very nature of the thing imported so much; for every alderman ought to be a citizen, and an inhabitant of the city where he is an alderman; and if he remove, he ceases to be a citizen; but he may be a freeman, though he want that qualification which enables him to be an alderman.

It was agreed also, That there cannot be more apt and express words of the defendant's absence than the words in this

(a) See *Rex v. Mayor of London*, Ante. 52. 1. Shower, 240.

(b) 1. Sid. 14. 81.

(c) 3. Bulst. 190. 1. Roll. Rep. 409.

(d) *Stanton's Case*, Moor, 135.—But a corporate office does not become *ipso facto* vacant by the non-residence of the

corporator: it may be a forfeiture, but the corporator does not lose his *franchise* till a sentence of amotion has been pronounced *Rex v. Heaven*, 2. Term Rep. 772. ; and see *Rex v. Ponsoby*, F. Vezey Rep. in Chancery 6. and Bull, N. P. 211.

return,

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return, "*habitationem suam reliquit*," and that he did inhabit at *Topſam, extra civitatem*; that it was alſo his duty to attend at the common council; and that it was *contra debitum officii* to be abſent.

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* [37]

* But that which made the return not good was, That there was no *particular ſummons* returned for the defendant to appear, and answer what ſhould be objected againſt him; and therefore they had proceeded againſt him without hearing; and if ſo, his diſfranchiſement was againſt right and juſtice. This is the expreſs reſolution in *James Bagg's Caſe (a)*: and though it is ſaid that he did not appear *licet ſummonitus fuit*, that is not material; for he muſt and ought to have a *particular ſummons* for a particular charge; and it is not ſufficient to ſummon him generally, and then to alledge particular crimes againſt him, which he may not be prepared to answer. If he left his habitation for a time he might return; and, coming before the diſfranchiſement, that might cure the defect of his removal: he might have ſome reaſonable cauſe for his abſence, as ſickneſs, &c. or going to the *Bath* for the recovery of his health, or being employed in the ſervice of the king, and yet he may leave a ſervant in his houſe, and be an inhabitant there ſtill (*b*). Then as to the certainty of the matter here alledged, if it had been ſet forth in a *plea*, it might have been ſufficient, becauſe the party might reply and answer it; but being in a return to a *mandamus* it is otherwiſe; and this is proved by the caſe in *Bulſtrode (c)*, cited by the other Judges to maintain this return. That caſe was, It was returned, that *Taylor* was ſummoned before thirty of the common council in the council chamber, and did not aver that at that time a common council was held, and for this uncertainty that return was held inſufficient.

Q. If a corporator, before he is removed from his office, ought not to have a *particular ſummons* to attend, and hear and answer the charges assigned as cauſe of his removal?

But, by the opinion of THE OTHER THREE JUSTICES, the return in this caſe was held good.

And yet afterwards, in *Michaelmas Term* in the ſeventh year of *King William*, one *Morris* brought a *mandamus* to be reſtored to the place of capital burgeſſes of the *Devizes* in *Wiltſhire*, and a return was made of the cauſes of his diſplacing; but no mention was made that he had any *notice* or *particular ſummons* to

(a) 11. Co. 98.

(b) See Reg. v. Trubody, 2. Ld. Ray. 1275. See alſo the caſe Rex v. Mayor of Leicester, Eaſter Term, 7. Geo. 3. where to a *mandamus* to reſtore an alderman, it was returned, that he departed with his family on the 1ſt May, and entirely left the borough with an intent to reſide, inhabit, and dwell with his family for the future elſewhere; and that on the 10th of September following he was removed. And by LORD MANSFIELD, this man had not totally left the borough; there is no pre-

tence to ſupport this return; he was only abſent about four months; they never asked him if he intended to return, and they have given him no notice of the charge. 4. Burr. 2089. But in the caſe of Rex v. Lyme Regis, Eaſter Term, 19. Geo. 3. it is decided, that where non-reſidence is a ground for removing a corporator, it is unneceſſary to ſummons him preſviously to come and reſide, Dougl. 149.—See Eſpinaffe Digelt, 2. Edit. 679.

(c) 3. Bulſt. 190.

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answer the charge (a); and judgment was given in that case pursuant to the opinion of THE CHIEF JUSTICE, that the return was ill.

(a) Particular notice ought to be given to the party himself who is to be disfranchised, that the assembly mean to proceed to remove him, in order that he may prepare his defence, *Rex v. Liverpool*, 2. Burr. 731.; but as notice and summons is only necessary to afford the corporator an opportunity of being heard in his defence, if a corporator be ordered to prepare his defence by such a time, and he is actually heard in his defence, a *special summons* is not necessary, *Rex v. Chalker*, 1. Ld. Ray. 225. 1. Salk. 428.

5. Mod. 254. 257. So also, where a corporator had declared, that he would serve no longer, and was thereupon removed, the Court refused to restore him, though he had not been summoned, *Rex v. Axbridge, Cowp.* 532. So where a corporator appeared, and freely and voluntarily resigned his office, *Rex v. Rippon*, 2. Salk 433. But if a corporator is removed without having been either *summoned* or *heard*, the Court will grant a *mandamus* to restore him, *Rex v. Cambridge*, 1. Stra. 557.

* [38]

Case 13.

* The Case of the Inhabitants of Hornsey.

On a presentment against parishioners for non-repair of a common highway, the defendants may plead the *general issue*, and give in evidence that the highway is in repair; but cannot shew that they are not bound to repair, unless it is specially pleaded.

S. C. Fort. 254.
S. C. 1. Show.
270. 291.
S. C. 10. Mod.
150.
S. C. 12. Mod. 13.
S. C. Holt, 338.
S. C. Carth. 212.

THE JUSTICES OF THE PEACE upon their *view* PRESENTED, that a *common highway* leading from such a place, &c. to the church of *Hornsey*, was out of repair, and that the inhabitants thereof ought to repair it.

Upon a *traverse* to this presentment, the jury find that the way was out of repair, but that it was not a *common highway*.

The question was, Whether this should have been pleaded specially, or whether it might be given in evidence upon the *traverse*?

And it was insisted, that this depended upon the construction of the statute of 5. *Eliz.* c. 13. upon which this presentment was made, and upon that clause thereof wherein it is enacted, "that the presentment of a justice of peace upon his own knowledge shall be of the same effect in the law, as a presentment upon the oath of twelve men, who may thereupon assize fines at the sessions, saving to every person or persons who shall be touched by such presentment, to have his lawful traverse to the same, as they might have to any indictment of trespass (a)."

S. C. Carth. 212. Jones, 355. 1. Roll. Rep. 406. Ld. Ray. 725 858. 1169. Stra. 181.

(a) This statute and all others relating to public highways are repealed, and the laws upon this subject reduced into one act, the 13. *Geo.* 3. c. 78. by the 24th section of which, "any justice upon his own view, or upon information, &c. may make presentment, at the general quarter sessions, of any highway, causeway, or bridge, not well and sufficiently repaired and amended, and no such presentment shall be removed from such jurisdiction until traverse and judgment given thereon, except

"only where the duty or obligation of repairing such highway, causeway, or bridge, may come in question, &c. saving to every person that shall be affected by any such presentment, his lawful traverse to the same, as well with respect to the fact of *non-repair*, as to the duty or obligation of repairing the said highway, &c. as they might have had upon any indictment for the same, presented and found by a grand jury."

Now

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Now on an indictment upon this very statute, this matter might be given in evidence upon the *general issue*; for if it had been pleaded that it was no highway, such plea would amount to no more than *not guilty*, and would not have been good. If then it may be given in evidence upon this plea, the presentment in this case is extrajudicial; for the authority of the justices is limited only to *common highways*, and it is found to be a *private way*: now they having a particular and limited jurisdiction, when they exceed that, what they do cannot be justified; it is not like what they do relating to the poor, for in that case they are judges.

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TANTS OF
HORNSEY.

CURIA. Upon this very statute the defendant may traverse the presentment of the justices, and give evidence that the way is in repair; for the design of the statute was, to make the presentment no more than an inquisition: but before the statute he could not have taken a traverse; for then the justices, as in cases of *forcible entry*, were the only judges, which could not be traversed. But in this case they ought to have pleaded *reparare non debent*, and that a person (naming him) ought to repair; but by taking this traverse, the presentment is admitted to be good (a).

(a) In S. C. 1. Show. 251. it is said that it was "ordered to stay," but it is now settled, in the case of Rex v. Justices of Wiltshire, that a *mandamus* will lie to compel the justices to receive and

admit a *general traverse* to a presentment by a justice on view of a highway being out of repair, 3. Burr. 1530. S. C. 1. Bl. Rep. 467. See also Rex v. Weston Penyard, 4. Burr. 2507.

* Sawyer against Killigrew.

[39]

Case 14.

GEORGIUS SAWYER, nuper de Westm. in com. præd. ar. alias dict. GEORGIUM SAWYER, &c. sum. fuit ad respondend. GULIELMO KILLIGREW, mil. de placito quod teneat et convention. inter eos factam secundum vim formam et effectum cujusdam scripti agreementi inde inter eos confecti. &c. Et unde idem GULIELMUS per JOHANNEM EDKINS attorn. suum dicit quod ipse idem GULIELMUS 27. die Julii anno regni domini Caroli Secundi nuper regis Angliæ, &c. tricesimo apud paroch. Sancti Martini in Campis in com. præd. habuit tenuit et exercuit officium vicecamerarii Serenissimæ Majestatis KATHERINÆ tunc reginæ consorti præd. nuper regis et modo reginæ dotissæ Angl. adhuc ibidem in plena vita existen. et proficuis eidem officio pertinen. et spectan. Cumq. etiam postea scilicet prædicto 27. die Julii anno regni dict. nuper regis 34. supradict. apud paroch. præd. Sancti Martini in Campis pro venditione officii præd. per eundem GULIELMUM prædicto GEORGIO fensd. per quoddam scriptum agreementi inter eundem GULIELMUM per nomen domini Anglice SIR WILLIAM KILLIGREW et prædictum GEORGIUM per nomen GEORGII SAWYER ar. facti. quod quidem scriptum agreementi idem GULIELMUS sub manibus et sigillis prædicti. GULIELMI et GEORGII confect. hic in curia profert cujus dat. est eisdem die et anno præd. GEORGIUS cum assensu et approbatione prædictæ reginæ agreevit cum prædicto GULIELMO

Middlesex. ff.

Covenant for the sale of an office, and the vendor to have the pension belonging to it.

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SAWYER
against
KILLIGREW.

S. C. 2. Vent.
79.
S. C. Carth.
196.

* [40]

pro officio suo vice camerarii prædicto; quodq. ipse præd. GULIELMUS durante vita sua naturali per agreement. prædict. GEORGII et cum consensu præd. reginæ teneret haberet gauderet et reciperet omnia proficua officii vicecamerarii præd. ac eo plene prout ipse idem GULIELMUS eadem tunc tenuit, viz. pension. annual. ducent. librar. legalis monet. per annum per præd. dominam reginam durant. vita ipsius GULIELMI solvend. ac dona sua novalia annualia ANGLICE his yearly new year's gifts centum et viginti libr. legalis monet. per an. pro vita sua ac etiam annual. feod. et liberat. Angl. livery existen. sexaginta et sex libr. per annum; acetiam salar. alimentar. ANGL. salary board-wages de officio gazophilacii ANGLICE cofferer's office centum et triginta libr. legalis monet. per annum in toto attingen. ad summam quingentar. et sexdecim librar. * per annum vel eo circiter, omnia quæ præd. GEORGIUS per scriptum præd. obligavit se quod præd. GULIELMUS haberet perciperet et gauderet durante vita ipsius GULIELMI naturali quodq. ipse præd. GEORGIUS nullam partem inde reciperet usq. post mortem præd. GULIELMI. Prædictusq. GEORGIUS per scriptum præd. agreevit accommodare prædicto GULIELMO durante vita sua ipsius GULIELMI usum cubiculor. ANGLICE lodgings apud domum vocat. Somerset House supra domos pro locatione curruum ANGL. coach houses prout per scriptum præd. plenius apparet; quodque ipse idem GULIELMUS KILLIGREW per agreement. præd. et per consensum præd. reginæ fuit habere et durante vita sua naturali gaudere et recipere tota proficua præd. officii vicecamerarii tam plene quam ipse adtunc tenebat officium præd. ducent. libras per annum à præd. regina pro pension. durante vita prædictæ reginæ acetiam annual. novi anni dona de centum et viginti libris pro vita sua acetiam sua annual. feod. dona et liberat. ANGLICE liveries existen. sexaginta et sex libr. per ann. et etiam sua solar. ANGL. board wages ab officio gazophil. ANGLICE the cofferer's office de centum et triginta libris per annum in toto se attingen. ad quingent. et sexdecim libras per an. aut eo circiter quæ omnia præd. GEORGIUS per agreementum præd. promisit ad et eum præd. GULIELMO quod ipse GULIELMUS KILLIGREW reciperet et gauderet durante vita sua naturali et quod ipse GEORGIUS non reciperet aliquam partem inde donec post mortem prædicti GULIELMI. Et prædictus GEORGIUS agreevit etiam cum prædicto GULIELMO accommodare prædicto GULIELMO durante vita sua usum cubil. apud domum SOMERSET supra domos pro locatione cur. prout per scriptum præd. plenius apparet. Et idem GULIELMUS in facto dicit quod prædicta regina adtunc et ibidem omnia in agreemento præd. approbavit et eisdem consensit; quodque ipse idem GULIELMUS in performance. agreementi prædicti POSTEA scilicet eisdem die et anno supradictis apud paroch. Sancti Martini in Campis debito modo sursum reddidit officium præd. reginæ prædictæ ac superinde in ulteriori performance. agreement. præd. præfat. GEORGIUS per procuracionem ipsius GULIELMI in officium illud per prædictam dominam reginam ibidem debito modo admissus fuit et officium illud una cum proficuis eidem officio pertinen. et specian. abinde hucusq. tenuit et gavisus fuit et adhuc tenet et gaudet et septingent.

tingent. et octoginta libr. de prædicto salario alimentario * ex officio Breach assigned.
gazophilacii solubil. officio vicecamerarii præd. pertinen. pro sex annis finit. ad festum Sancti Michaelis anno domini 1688 ad festum illud secundum convention. et agreement. præd. præfat. GEORGIUS præd. GULIELMO solubil. devener. et solvi debuer. Quas quidem septingent. et octoginta libras idem GULIELMUS non recepit; et prædictus GEORGIUS licet sæpius requisit. præd. 780l. aut aliquem inde denar. eidem GULIELMO nondum solvit sed illas ei solvere omnino recusavit et adhuc recusat. Et sic idem GULIELMUS dicit quod præd. GEORGIUS convention. suam cum prædicto GULIELMO in hac parte fact. eidem GULIELMO secundum formam et effectum scripti il. non tenuit sed infregit et il. ei tenere bucusq. penitus contradixit et adhuc contradicit; unde dic. quod deteriorat. est et damnum habet ad valentiam 800l. et inde producit secutam, &c.

Et prædict. GEORGIUS SAWYER per NATHANIELEM SECOMB The defendant
pleads aBrio non,
&c. attorn. suum venit et defendit vim et injuriam quando, &c. Et dic. quod præd. GULIELMUS KILLIGREW action. suam præd. inde versus eum habere seu manutenere non debet, quia dicit quod ipse idem GEORGIUS à tempore confessionis scripti agreementi præd. usq. diem impetrationis brevis originalis ipsius GULIELMI permisit ipsum GULIELM. recipere annuatim omnes denariorum summas pro salar. alimentar. ex officio gazophilacii præd. solubil. eidem officio vicecamerarii præd. pertinen. secundam formam et effectum agreementi præd. ABSQ. HOC quod præd. GEORGIUS à tempore confession. scripti agreement. præd. bucusq. aliquod proficuum præd. officio vicecamerarii spectan. vel pertinen. recepit vel gavissus fuit; et hoc parat. est verificare; unde petit iudicium si præd. GULIELMUS actionem suam præd. inde versus eum habere seu manutenere, &c.

To this the plaintiff demurs: Et pro causis morationis in lege idem GULIELMUS juxta formam statut. in hujusmodi casu edit. et provis. monstrat et Cur. ostendit has causas sequen. viz. quod præd. GEORGIUS in placito suo præd. transversus materiam non allegat. in præd. narration. ipsius GULIELMI, et quod placitum præd. est incertum et repugnans et caret forma, &c.

Defendant joins in the demurrer.

Et quia Justit. hic se advisare volunt de et super præmissis priusquam iudicium inde reddant, dies dat. est partib. præd. hic usq. à die Sancti Michaelis in tres septiman. de audiend. inde iudicio suo eo quod iidem Justit. hic inde nondum, &c. Ad quem diem hic ven. iam præd. (quer.) quam prædict. (defend.) * per attorn. suos præd. Et super hoc vis. præmissis et per Justit. hic plene intellectis videtur eidem Justit. hic quod præd. placitum præd. GEORGIUS modo et forma præd. superius placitat. materiaque in eodem contenti. sufficien. in lege existunt ad ipsum GULIELMUM ab action. sua præd. inde versus ipsum GEORGIUM habend. præcludend. prout idem GEORGIUS superius allegavit. IDEO CONSIDERATUM EST, quod præd. GU-

Trinity Term, 3. William & Mary, In B. R.

SAWYER
against
KILLIGREW.

LIELMUS *nihil capiat per breve suum præd. sed sit in misericordia pro falso clamore suo ; et quod præd.* GEORGIUS *eat inde sine die, &c.*

THE AGREEMENT is set forth in the pleading, and it was in these words :

" THIS IS TO DECLARE, That I George Sawyer have by his majesty's consent and approbation, as follows, agreed with Sir William Killigrew for his vice-chamberlain's place, and that he, the said Sir William Killigrew, is, during his natural life, by my agreement and with her majesty's consent, to hold, enjoy, and receive the whole profits of the said vice-chamberlain's place, as fully as he himself doth now hold the same ; that is to say, two hundred pounds *per annum* from her majesty by pension during her life, and also his yearly new-year's gifts of one hundred and twenty pounds for his life, and also his yearly fees, and gifts, and liveries, being sixty-six pounds *per annum* ; and also his salary board-wages from the cofferer's office of one hundred and thirty pounds *per annum* ; in all amounting unto the sum of five hundred and sixteen pounds *per annum*, or near it ; all which I do engage myself that Sir William Killigrew shall have, receive, and enjoy, during his natural life, and I am to receive no part thereof until after his death ; and I do also agree to lend the said Sir William Killigrew, during his life, the use of his lodging in *Somerſet-houſe*, over the coach-houſe : IN WITNESS whereof I have hereunto set my hand and seal this 27th day of July, 1682."

* [43]

2. Vent. 79.
8. Mod. 318.
10. Mod. 143.
384.
Comy. 230.
Ld. Ray. 968.
1140. 1416.
Stra. 231. 763.

* Upon this agreement an action of covenant was brought in the common pleas, wherein the plaintiff set forth, that he was *vice-chamberlain* to THE QUEEN DOWAGER, and that there was an agreement between him and the defendant for the sale of the said office, which the defendant was to have by the consent of THE QUEEN ; and that by the said agreement the plaintiff was to enjoy a *pension* during the life of THE QUEEN, and the other profits of the office during his own life ; that pursuant to this agreement he surrendered the office to THE QUEEN, and procured the defendant to be admitted, which was accordingly done, and that he enjoyed the office ; and for six years arrears of salary this action was brought.

The defendant pleaded in bar, that he had suffered the plaintiff to enjoy the profits, &c. according to the agreement ; and traversed that he had received any part of the profits of the said office.

And upon a demurrer judgment was given upon the point of pleading, that the *traverse* was ill (a).

Upon this judgment A WRIT OF ERROR was brought in the king's bench.

The question there debated was, Whether this was a good grant or not ? And it was agreed, that nothing but usage could support it.

(a) This judgment was for the defendant Sawyer that the bar was good.—NOTE to the former Edition.

Then

Trinity Term, 3. William & Mary, In B. R.

Then IT WAS ARGUED, that this covenant was in the nature of a *personal warranty*, and not to be compared to a covenant for quiet enjoyment, where, upon a disturbance, the party has a remedy over; but this action rests upon the covenant itself, and does not wait upon the office: for if THE QUEEN should die, the defendant is still bound, and so he is also if the profits of the office should be sunk. It is more properly like the case of *Robinson v. Cuthbert (a)*, which was in consideration that the plaintiff would deliver so much good silk, the defendant promised to see him paid. So another promise was *(b)*, that if the plaintiff would deliver wines to A. the defendant said, "he should not lose a penny;" in both which cases the inference is, that he will pay it; it is an obligation and a peremptory undertaking for him to pay the money. An obligor in a bond was not to be found, whereupon a third person promised the obligee, that in consideration he would give him a letter of attorney to put the bond in suit, that he would warrant the debt; the breach was held to be well assigned *(c)*, that the plaintiff had performed the consideration, and the defendant had not paid * the money (without saying that the obligor had not paid it) because the warranty was personal. So where a man *(d)* warranted to the plaintiff all the money which another person owed him, the breach is well assigned in not paying the money, and not in the not warranting.

SAWYER
against
KILLIGREW

* [44]

E contra. The meaning of this covenant must be, that the plaintiff must do some act in order to receive the profits, as to ask it of the treasurer: the defendant is not bound by this agreement to pay the money, but only restrained from intermeddling with the salary, &c. He engaged that the plaintiff should receive the profits of this office, and in assigning of the breach the plaintiff does not shew that he was disturbed by the defendant, or any wise hindered by him from receiving it; and therefore the breach is not well assigned.

Cro. Eliz. 914.
Yelv. 30. idem.
Ld. Ray. 106.
124

And of this opinion was THE CHIEF JUSTICE, and EYRE, Justice.

The other TWO JUSTICES *contra*. These two held that there was a good breach, and that the bar was good, and a direct answer to the breach. So all were against the plaintiff in the writ of error.

Wherefore he proceeded no further, and there it hangs.

(a) Mich. Term, 21. Car. 2.

(c) 2. Roll. Abr. 738. pl. 1.

(b)

(d) 1. Sid. 170.

Newport against Godfrey.

Case 15.

Michaelmas Term, 1. Will. & Mary. Roll. 200.

DEBT in the *detinet* against the defendant, as executor of Turner, for rent arrear, in the life-time of the testator upon a lease parol; and it appeared upon the declaration that the lease expired in the life-time of the said Turner.

To debt against
an executor for
rent on a parol
demise, he can-
not plead bonds

not satisfied; for these debts are in *equal degree*, although the parol lease expires in the life-time of the testator.—S. C. 3. Lev. 267. S. C. 2. Vent. 184. S. C. 12. Mod. 7. Carth. 512. 1. Salk. 326. 2. Raym. 515. 2. Bac. Abr. 434. Vent. 146. 209. 3. Lev. 57. 8. Mod. 288. 356. 10. Mod. 12. 163. 255. 324. 12. Mod. 291. Ld. Ray. 36. 698. 786. 1056. 1391. 1513. 1514. 70. 212. 1028.

Trinity Term, 3. William & Mary, In B. R.

NEWPORT
against
GODFREY.

The defendant pleaded several bonds entered into by the said Turner for the payment of the money, which he averred to be just debts, and that he had administered all *præterquam*, &c. which he retained to satisfy the said bonds.

Upon a demurrer to this plea, judgment was given, in the court of common pleas, for the plaintiff, that *the rent* ought to be paid before *the bonds*.

* [45]

For though it was objected, that if the lease had not been determined, the rent then due might be preferable to a bond debt, because the goods of the testator are liable to a distress, but that the lease being determined, it was only a personal thing, and could not take place of specialties; yet THE COURT was of opinion that the debt for * this rent did still favour of the realty, and that the determination of the lease made no alteration in the contract, but that the action might be maintained by reason of the profits of the lands which the testator had received.

Upon this judgment a writ of error was brought, and it was affirmed in this court. *Vide* 1. Cro. Jac. 233. Barwick v. Fosser. Fitz. Abr. tit. *Avowry*, 240. (a).

(a) See the case of Gage v. Aston, 1. Freem. 512. 515. Carth. 511. 1. Salk. 325. Holt, 309. 12. Mod. 288. Prec. Chan. 137. 2. Vern. 480. 1. Bq. Abr. 63. 1. Ld. Ray. 5. and Mr. Rose's Edition of Comyns' Rep. 67.; where it is agreed by the whole Court, that an executor or administrator may plead a *retainer*, for satisfaction of a debt on bond due to himself, to an action of debt for *rent*, for they are in equal degree; but it was held, on the authority of the above case of Godfrey v. Newport, that executors cannot, to debt for rent, plead

a bond not yet satisfied, nor *à contra*; for being debts in equal degree, one cannot be a bar to the other. And in the case of Strachan v. Ilford, Comyns' Rep. 145. a defendant executor pleaded to debt for rent incurred in the life-time of the testator on a lease by parol, that the testator was indebted to him in two several bonds and no assets *ultra*, and the whole Court resolved that the plea was good. See Leon v. Casey, 2. 1. Rep. 965. Plummer v. Merchant, 3. Burr. 1383. Vaughan v. Brown, Andr. 331. as to an executor's right to retain.

Case 16.

Grimly against Fawldingham.

A *modus* for tithes of a water corn mill is not destroyed by adding another pair of stones to it.

S. C. 1. Show.

281.

S. C. Carth. 215.

2. Inst. 621.

F. N. B. 51.

3. Bull. 212.

2. Cro. 523.

Lit. Rep. 314.

1. Roll. Rep.

84. 405.

1. Roll. Abr. 652. placit. 3. 12. Mod. 143. 3. Com. Dig. 518.

IN a prohibition to a libel in the spiritual court for the tithes of a water corn-mill, a *modus* was suggested. The defendant confessed the *modus* as to part, but said that there was an addition to the ancient mill; viz. another pair of mill-stones ("your mill anciently had but one pair of mill-stones, but of late had two pair") and so prayed that the prohibition might only go to the tithes of the ancient mill.

It was argued, that most mills of common right ought to pay tithes, and that executors may be sued for arrears of tithes of mills in the life-time of the testator. It is true, no tithes ought to be paid for *fulling-mills*, because the gain is uncertain, and arises by the labour of men (b), and therefore tithes in such cases ought not to be paid without a special custom to warrant it, but only of

(b) 2. Inst. 625. 1. Roll. Abr. 656. pl. 34.

thing

Trinity Term, 3. William & Mary, In B. R.

things renovant. On a prescription to a *modus* to pay so much every year in lieu of all tithes issuing out of two old houses and mills, it appeared that afterwards, the owner of the houses built two new corn-mills under the same roof; and it was held that these new mills should not be discharged of tithes by virtue of the old *modus*, because such tithes are not merely *predial* but *personal* likewise, and the miller ought to pay the tenth gish; though it is said in the same book, that tithes of *paper* and *fulling mills* are personal.

GRIMLY
against
FAWLKING-
HAM.

E contra it was said, That the *modus* extends as well to the new mill-stones as to the old: for if these break, the *modus* goes to the new; so that though they are laid down in any other place, yet if they are under the same roof, the prescription will extend to all, because the mill is the substance to which it chiefly relates; the prescription is to the mill in general, and it is but accidental whether there are one or two pair of stones therein; it is still but *unum molendinum*, and must be so demanded in a *præcipe*. * In *Lutterel's Case* (a) it was held, that if a man had *estovers* by prescription, the alteration of the rooms in his house, or adding new chimneys or rooms, will not destroy the prescription. So if an old mill or house fall, or is pulled down, the owner may re-edify upon the same foundation, which is the perdurable part of the estate, and in judgment of law includes the new as well as the old house when standing.

* [46]

Fitzg. 88.
Ld. Ray. 1400.

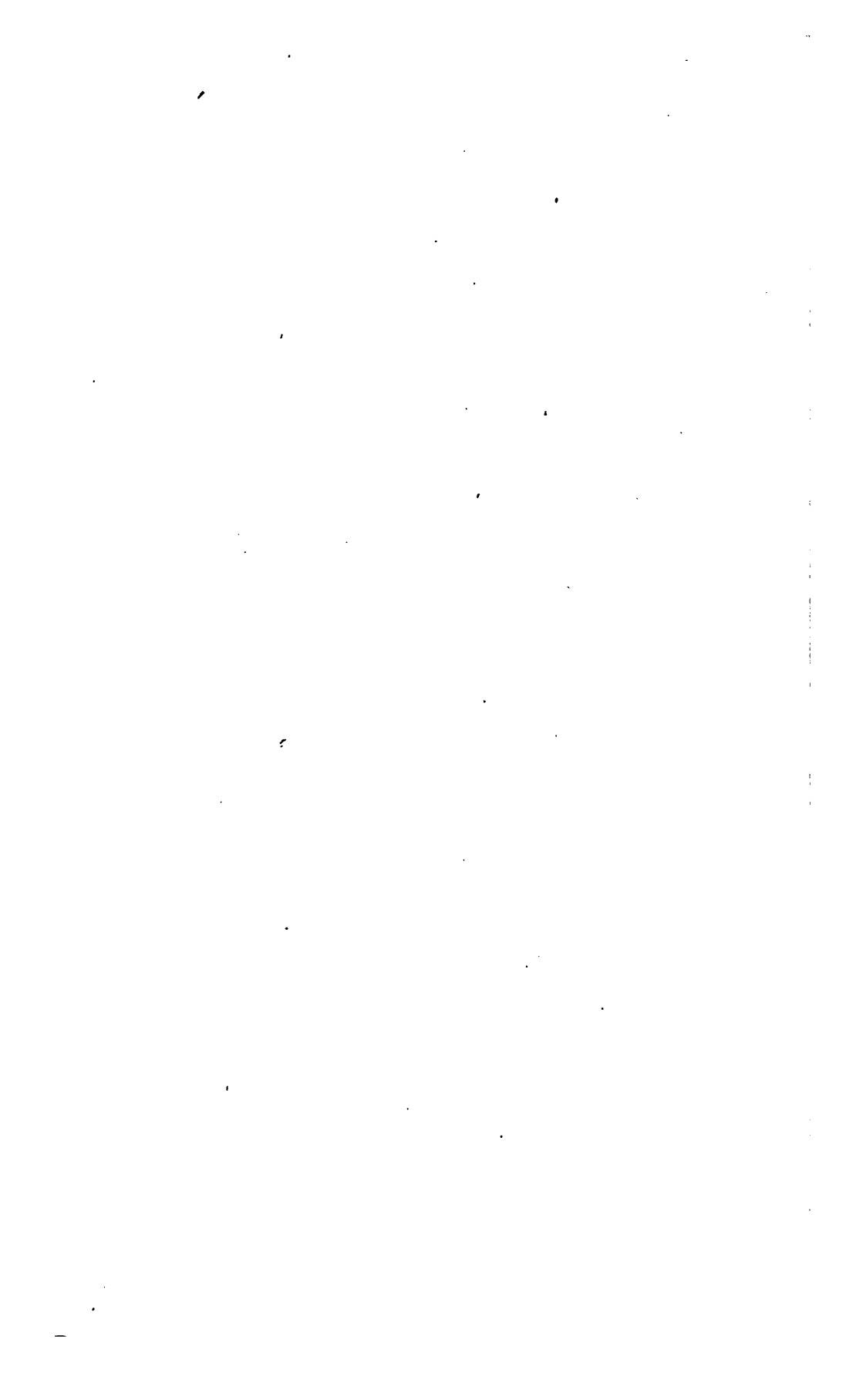
A prohibition was granted (b).

(a) 4. Co. 86.

(b) The libel in the spiritual court was for tithes of a *water-mill* and of a *wind-mill*; and on motion for a prohibition two questions arose: FIRST, Whether the *modus* for the *water-mill* was destroyed by the addition of another pair of stones under the same roof? And *Gartbaw* says, the Court were of opinion that the *modus* was not thereby destroyed, S. C. Carth. 216. But see 1. Brownl. 32. and 3. Com. Dig. "Disines" (E. 20.), and the case of *Talbot v. May*, 3. Atkins, 17. *contra*. — THE SECOND QUESTION was, Whether the tithes for the *windmill* ought to be *predial*, a tenth of the corn ground; or *personal*, a tenth of the clear gain? S. C. Carth. 215. And Sir B. Shower reports *HOLT, Chief Justice*, to have been of opinion, that the tithes ought to be *predial*, for that a tenth toll-dish becomes payable *rectori loci* where the mill is situated, and not where the miller lives, S. C. 1. Show. 281. A prohibition, however, was granted generally, on purpose that the point might receive a solemn determination; but it does not appear that the record proceeded to try the question. The opinion of *HOLT, Chief Justice*, that a *corn-mill* shall pay the tenth toll-dish, is confirmed by 1. Roll. Abr. 656 l. 35.; by *WARRINGTON* and *NICHOLS, Justices*,

2. Roll. Rep. 84.; by *PRICE* and *MONTAGUE, Barons*, Bunt. 77.; and by *LORD HARDWICKE*, 3. Atkins. 19.; but *COKE* is of opinion, the tenth toll-dish is only due by *custom*, 2. Inst. 621.; and in the case of *Oliver v. Dodson*, Bunt. 73. *BURY* and *PAGE, Barons*, say, that the tithe of an ancient *corn-mill* is *personal*. — In the case of *Chapman v. Barton*, a case was adjourned into the court of exchequer, to consider whether the tithe of a *water corn-mill* was a *predial* or a *personal* tithe, Bunt. 184.; and in the case of *Chamberlain v. Newt* it was determined in the house of lords, on appeal from the court of exchequer, and against several seeming authorities or doubts in the books, 1. Eq. Abr. 366. that the tithe of corn ground in a *horse-molt-mill* is a *personal* tithe only, that is to say, a tenth part of the clear profits arising from corn ground in the mill, over and above all incident charges, S. C. 1. Brown's Cases in Parl. 159, 160. S. C. 9. Viner. Abr. 37. S. C. 2. Eq. Abr. 732.; and on the authority of this decision it was determined, in the case of *Carleton v. Brightwell*, that a *corn mill* should only pay a *personal* tithe, 2. Peer. Wms 463. and seemingly it was so determined in the subsequent case of *Douall v. Lowther*, 2. Har. K. B. 336.

MICHAELMAS



MICHAELMAS TERM,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

- The College of Physicians *against* Bush.

Trinity Term, 3. Will. & Mary, Roll 717.

* [47]
Case 17.

THEY brought an action of debt upon the statute of 14. *Hen. 8. c. 5.* which prohibits the practice of physick within *London*, or seven miles thereof, under the penalty of five pounds for every month, except the party is approved under the seal of the College: and for practising physick in *Westminster* for so many months, this action was brought.

Letters patent from the king, allowing certain persons to practise physick in *London*, &c. does not exempt them from the penalties of 14. *Hen. 8. c. 5.* for practising without licence from the College. *Comy. 79.*

The defendant pleaded letters patents of *King Charles the Second*, by which free liberty is given to *French Protestants* to exercise the faculty of physick in *London* and *Westminster*, &c. and that he was a *French protestant*, &c.

8. C. 12. Mod. 10. Ld. Ray. 472. 10. Mcd. 353. 8. Mod. 12.

Upon a demurrer the plea was held ill.

But then an exception was taken to the declaration, which sets forth, that the defendant practised physick in *Westminster*, and does not say that it was within seven miles of *London*.

A declaration on the 14. *Hen. 8. c. 5.* for illegally practising physick in *Westminster*, must alledge

For which reason the defendant had judgment.

that *Westminster* is within seven miles of *London*.—1. Term Rep. 141.

Hannam

* [48] Michaelmas Term, 3. William & Mary, In B. R.

Cafe 18.

* Hannam *against* Woodford.

Trinity Term, 3. Will. & Mary, Roll 257.

A *rights* is not assignable, and therefore if *THE* *converse* of a statute sue an *extent*, and a *liberate* is returned, yet if he suffer *THE* *conson* to keep *possession*, he cannot assign the lands; for his possession under the *liberate* is, by his *non entry*, turned to a *right*.

AFTER the death of a *cognizee* in a statute, his administrator sued forth an *extent*, and, the *liberate* being returned, he made an assignment of the lands without an actual entry; or without executing the deed upon the land.

The question was, Whether this assignment was good or not ?

It was compared to an *interesse termini*, and that this assignment was good, because a man may grant or dispose of what he has not actually in possession (*a*). And to prove this assertion, the case of *Powfley v. Blackman* was cited, which is reported in many Books (*b*), and is shortly thus : A mortgage was made of lands for payment of money within the space of five years, at several payments ; and in the same deed it was agreed, that the mortgagee should not intermeddle with the actual possession of the profits until default of payment, &c. ; afterwards the mortgagor made a lease of the lands for six years ; the lessee entered, the money was not paid, and at the end of the term the lessor had his estate again ; the mortgagee, without any lawful entry, devised the lands to his son, and died ; and it was adjudged, that the devise was good, which could not be, if the lease made by the mortgagor had been a disseisin.

But on the other side it was said, that by the return of the *liberate* the administrator had no right, only a *possession* in law, *quousque de debito fuerit satisfactus*. The proper way had been to bring an *ejectment* upon the *liberate* to recover the possession, and then the assignment had been good.

And of this opinion was THE COURT. *Vide Plow. 423. Co. Car. 270. a.*

S. C. 1. Show. 290.
S. C. 2. Salk. 563.
S. C. Skin. 300.
S. C. 3. Lev. 312.
S. C. Holt, 611.
2. Roll. Abr. 67.
Co. Lit. 314.
3. Co. 4.
5. Co. 25.
Cro. Eliz. 275.
819.
3. Lev. 388.
2. Vern. 519.
10. Mod. 177. 265. 12. Mod. 573. Ld. Ray. 166. 750. 808. 853. 1. Peer Wms. 572.
2. Peer Wms. 91. 3. Peer Wms. 26. 132. 199. 308. 368. Stra. 1086. 1. Bac. Abr. 157.

(a) 10. Co. 47. 1. Sid. 188. 241. 1. Roll. Abr. 859. Palm. 208.
1. Chan. Cases, 8. 2. Vern. 563. Bridgm. 12.
(b) Cro. Jac. 659. 2. Roll. Rep.

Cafe 19. The King and Queen *against* Buckeridge and Others.

What shall be evidence of lands being chargeable *ratione tenuræ* to the repair of the highway.

AN INFORMATION was brought against the defendant for not repairing of a highway *ratione tenuræ* between *Stratford and Bow*.

It was tried at the bar by an *Essex* jury.

* [49]

* The evidence for the king was, that *Maud* the empress gave certain lands to the *Abbes of Barking* to repair this way ; that the abbess, &c. sold those lands to the *Abbot of Stratford*, who by the

12. Mod. 198.
409.

Ld. Ray. 725. 792. 804. 856. 1175. 1249. 1353. Stra. 181. 187. 909. 1004.

consen

Michaelmas Term, 3. William & Mary, In B. R.

consent of his convent charged all his lands for the repair of the way; and thus it stood till the dissolution, &c.; that then all the lands of the *Abbot of Stratford* being vested in the crown, were granted to *Sir Peter Mewtis*, who held them charged for repairing the way; and that from him by several mesne conveyances they came to the defendants.

THE KING
AND QUEEN
against
BUCKERIDGE
AND OTHERS.

This was proved by several witnesses living in other parishes; none being admitted to give evidence (a), who lived in either of the said parishes of *Stratford* or *Bow*.

But it was said for the defendants, that no lands shall be chargeable for the repairing this highway, *ratione tenuræ*, but such as were originally given for that purpose; and so the defendants could not be guilty, unless it was proved that they had some of those lands in possession which were given by the *empress* to the *Abbess of Barking*, and that no other lands were liable, formerly belonging to the *Abbot of Stratford*, but such which he bought of the said abbess.

THE COURT was of opinion, that upon this evidence all the lands of the *Abbot* were liable to repair this way, and directed the jury accordingly, who found for the plaintiffs.

(a) 1. Vern. 159. 154. 2. Vern. 339, 372. 512. 520. Fitzg. 30. 1. Peer 317. 375. 463. 637. 10. Mod. 150. Wms. 595. Stra. 638. 683. 1069. 292. 11. Mod. 225. 12. Mod. 40.

The King and Queen against Alsop.

Cafe 20.

THE DEFENDANT was convicted before the justices of peace in sessions, upon an indictment brought against him upon the statute of 2. & 3. *Edw. 6. c. 14.* and upon that conviction he was committed, and afterwards brought a *habeas corpus*; and being in court, several exceptions were taken to the indictment.

A statute cannot be abrogated by non user.

FIRST, It was agreed on all sides, that this statute was in force by which it is enacted, "That no person shall shoot in any place any hail-shot, or more pellets than one at one time, upon pain to forfeit for every time that he or they shall so offend ten pounds, and imprisonment for three months (b).

* [50]

SECONDLY, it was objected, that the indictment sets forth, that the defendant did shoot conies in *Codden Wood*, but it does not appear where he stood when he shot, which may be in several vills, and the shooting being the offence, it must be certainly laid; so that upon this indictment there can be no issue.

An indictment on 2 & 3. *Edw. 6. c. 14.* is good without stating the place where the defendant shot.

S. C. 1. Show. 339. 10. Mod. 279. 248. Fitzg. 124. Ld. Ray. 791. 1415. 1478. Stra. 66. 358. 1101. Comy. 522. 576. See Coombe's Case, Cases in Crown Law, 300.

(b) Repealed by the 6. & 7. *Will. 3. c. 13. l. 3.*

THIRDLY,

Trinity Term, 3. William & Mary, In B. R.

SAWYER
against
KILLIGREW.

S. C. 2. Vent.
79.
S. C. Carth.
196.

• [49]

pro officio suo vice camerarii prædicto; quodq. ipse præd. GULIELMUS durante vita sua naturali per agreement. prædict. GEORGII et cum consensu præd. reginæ teneret haberet gauderet et reciperet omnia proficua officii vicecamerarii præd. adeo plene prout ipse idem GULIELMUS eadem tunc tenuit, viz. pension. annual. ducent. librar. legalis monet. per annum per præd. dominam reginam durant. vita ipsius GULIELMI solvend. ac dona sua novalia annualia ANGLICE his yearly new year's gifts centum et viginti libr. legalis monet. per an. pro vita sua ac etiam annual. feod. et liberat. Angl. livery existens. sexaginta et sex libr. per annum; ac etiam salar. alimentar. ANGL. salary board-wages de officio gazophilacii ANGLICE cofferer's office centum et triginta libr. legalis monet. per annum in toto attingen. ad summam quingentar. et sexdecim librar. * per annum vel eo circiter, omnia quæ præd. GEORGIUS per scriptum præd. obligavit se quod præd. GULIELMUS haberet perciperet et gauderet durante vita ipsius GULIELMI naturali quodq. ipse præd. GEORGIUS nullam partem inde reciperet usq. post mortem præd. GULIELMI. Prædictusq. GEORGIUS per scriptum præd. agreeavit accommo-are prædicto GULIELMO durante vita sua ipsius GULIELMI usum cubiculor. ANGLICE lodgings apud domum vocat. Somerset House supra domos pro locatione currum ANGL. coach houses prout per scriptum præd. plenius apparet; quodque ipse idem GULIELMUS KILLIGREW per agreement. præd. et per consensum præd. reginæ fuit habere et durante vita sua naturali gaudere et recipere tota proficua præd. officii vicecamerarii tam plene quam ipse ad tunc tenebat officium præd. ducent. libras per annum à præd. regina pro pension. durante vita prædictæ reginæ ac etiam annual. novi anni dona de centum et viginti libris pro vita sua ac etiam sua annual. feod. dona et liberat. ANGLICE liveries existens. sexaginta et sex libr. per annu. ac etiam sua solar. ANGL. board wages ab officio gazophil. ANGLICE the cofferer's office de centum et triginta libris per annum in toto se attingen. ad quingent. et sexdecim libras per an. aut eo circiter quæ omnia præd. GEORGIUS per agreementum præd. promisit ad et eum præd. GULIELMO quod ipse GULIELMUS KILLIGREW reciperet et gauderet durante vita sua naturali et quod ipse GEORGIUS non reciperet aliquam partem inde donec post mortem prædicti GULIELMI. Et prædictus GEORGIUS agreeavit etiam cum prædicto GULIELMO accommodare prædicto GULIELMO durante vita sua usum cubil. apud domum SOMERSET supra domos pro locatione cur. prout per scriptum præd. plenius apparet. Et idem GULIELMUS in facto dicit quod prædicta regina ad tunc et ibidem omnia in agreemento præd. approbavit et eisdem consensit; quodque ipse idem GULIELMUS in performance. agreementi prædicti POSTEA scilicet eisdem die et anno supradictis apud paroch. Sancti Martini in Campis debito modo sursum reddidit officium præd. reginæ prædictæ ac superinde in ulteriori performance. agreement. præd. præfat. GEORGIUS per procuracionem ipsius GULIELMI in officium illud per prædictam dominam reginam ibidem debito modo admissus fuit et officium illud una cum proficuis eidem officio pertinen. et specian. abinde hucusq. tenuit et gavisus fuit et adhuc tenet et gaudet et sep-
tingent.

tingent. et octoginta libr. de prædicto salario alimentario * ex officio Breach assigned.
gazophilacii solubil. officio vicecamerarii præd. pertinen. pro sex annis finit. ad festum Sancti Michaelis anno domini 1688 ad festum illud secundum convention. et agreement. præd. præfat. GEORGIUS præd. GULIELMO solubil. devener. et solvi debuer. Quas quidem septingent. et octoginta libras idem GULIELMUS non recepit; et prædictus GEORGIUS licet sæpius requisit. præd. 780l. aut aliquem inde denar. eidem GULIELMO nondum solvit sed illas ei solvere omnino recusavit et adhuc recusat. Et sic idem GULIELMUS dicit quod præd. GEORGIUS convention. suam cum prædicto GULIELMO in hac parte fact. eidem GULIELMO secundum formam et effectum scripti il. non tenuit sed infregit et il. ei tenere hucusq. penitus contradixit et adhuc contradicit; unde dic. quod deteriorat. est et damnum habet ad valentiam 800l. et inde producit secutam, &c.

Et prædict. GEORGIUS SAWYER per NATHANIELEM SECOMB The defendant
attorn. suum venit et defendit vim et injuriam quando, &c. pleads aſſio non
Et dic. quod præd. GULIELMUS KILLIGREW action. suam præd. &c.
inde versus eum habere seu manutenere non debet, quia dicit quod ipse idem GEORGIUS à tempore consecutionis scripti agreementi præd. usq. diem impetrationis brevis originalis ipsius GULIELMI permisit ipsum GULIELM. recipere annuatim omnes denariorum summas pro salar. alimentar. ex officio gazophilacii præd. solubil. eidem officio vicecamerarii præd. pertinen. secundam formam et effectum agreementi præd. ABSQ. HOC quod præd. GEORGIUS à tempore consecution. scripti agreement. præd. hucusq. aliquod proficuum præd. officio vicecamerarii spectan. vel pertinen. recepit vel gavissus fuit; et hoc parat. est verificare; unde petit iudicium si præd. GULIELMUS actionem suam præd. inde versus eum habere seu manutenere, &c.

To this the plaintiff demurs: Et pro causis morationis in lege idem GULIELMUS juxta formam statut. in hujusmodi casu edit. et provis. monstrat et Cur. ostendit has causas sequen. viz. quod præd. GEORGIUS in placito suo præd. traversat materiam non allegat. in præd. narration. ipsius GULIELMI, et quod placitum præd. est incertum et repugnans et caret forma, &c.

Defendant joins in the demurrer.

Et quia Justit. hic se advisare volunt de et super præmissis priusquam iudicium inde reddant, dies dat. est partib. præd. hic usq. à die Sancti Michaelis in tres septiman. de audiend. inde iudicio suo eo quod iidem Justit. hic inde nondum, &c. Ad quem diem hic ven. tam præd. (quer.) quam prædict. (defend.) * per attorn. suos præd. Et super hoc vis. præmissis et per Justit. hic plene intellectus videtur eidem Justit. hic quod præd. placitum præd. GEORGIUS modo et forma præd. superius placitat. materiaque in eodem content. sufficiens. in lege existunt ad ipsum GULIELMUM ab action. sua præd. inde versus ipsum GEORGIUM habend. præcludend. prout idem GEORGIUS superius allegavit. IDEO CONSIDERATUM EST, quod præd. GU-

Michaelmas Term, 3. William & Mary, In B. R.

THE COUNTESS
OF WINCHELSEA
against
LADY MAIDSTONE.

him, and by a *testatum fieri facias* his goods were taken in execution, and sold by the sheriff in *Hilary Term* 1657, for eight hundred pounds, which was after this deed of gift. It was proved that his steward paid the money, and redeemed the goods, and the *Earl* gave him a bond for repayment, which was done, and the bond cancelled, so that by this means he had gained a new property. A copy of the *testatum fieri facias* was produced, and likewise the bill of sale by the sheriff, and the bond cancelled.

And thereupon the plaintiff had a verdict.

* [53]

Cafe 22.

Sir James Smith's Cafe.

The judgment given in *quo warranto* against the city of London, "that the liberties thereof be seized into the king's hands" did not dissolve the corporation, or remove the members thereof from their corporate offices; and therefore if an alderman of the city, after the statute of 1. Will. & Mary, sess. 2. c. 8. l. 6. which enacts, "that if any person, then having any office, shall neglect to take the oaths therein prescribed, before the first of August" next ensuing, the said office shall be void, neglect to take the said oaths within the time

MANDAMUS to be restored to the place of an alderman of the city of London.

The substance of the return was, that *Sir James Smith* was an alderman of the said city on the thirteenth day of *February* 1688; that he was duly chosen according to the custom, &c.; that * he continued an alderman thereof until the first day of *August* 1689; that he did not take the oaths enjoined to be taken by all persons in office by virtue of an act of parliament made in the first year of the king and queen, which oaths were to be taken before the said first day of *August*; for which reason he was deprived, and has not been elected since.

The words of the statute 1. Will. & Mary, sess. 2. c. 8. §. 6. are, "That if any person now having any office or employment, civil or military, shall neglect or refuse to take the oath thereby appointed to be taken, in such manner as by this act is directed, before the first day of *August* 1689, or sooner if required thereunto by any order of his majesty in council, before such persons as by the said order shall be appointed to take and receive the same; that in such case the said office and employment of the person so neglecting or refusing shall be void, and is hereby adjudged void."

THE FIRST QUESTION was, Whether *Sir James Smith* was an alderman at the time of the making that statute, and whether he continued so to be until the first day of *August* 1689?

This depended upon the judgment in *quo warranto* against the city of London; for if the corporation was dissolved by that judgment, then, by consequence, *Sir James Smith* was no alderman at the time of the making of the statute 1. Will. & Mary, c. 8. and was not obliged to take the oaths, &c.; and if so, then a SE-mentioned, it is a forfeiture of his office, to which he is not restored by the statute of 2. Will. & Mary, sess. 1. c. 8. l. 7. which enacts, "that all officers of the said city who rightly held any office therein at the time the said judgment was given, shall be confirmed in, and have and enjoy the same as fully as they held them at the time the judgment was given, except such as have been removed for any just cause."—S. C. 1. Show. 263. 274. S. C. Carth. 217. S. C. Skin. 293. 310. S. C. Holt, 168. 310. S. C. 12. Mod. 17. 6. Mod. 78. 7. Mod. 77. 10. Mod. 174. 1. Vent. 66. 3. Burr. 186 6. 3. Term Rep. 573.

COND

Michaelmas Term, 3. William & Mary, In B. R.

SECOND QUESTION will arise, Whether by the act 2. *Will. & Mary*, *sess.* 2. c. 8. for the reversing the said judgment, and for restoring the city to its ancient rights, the said *Sir James Smith* ought to be restored?

SIR JAMES
SMITH'S CASE.

The words of 2. *Will. & Mary*, *sess.* 2. c. 8. are these :
 " Whereas a judgment was given in the court of king's bench
 " upon an information in *quo warranto* against the mayor, and
 " commonalty, and citizens of the city of *London*, that the liberty,
 " privilege, and franchise of the said mayor, commonalty, and
 " citizens, being a body politic and corporate, should be seized
 " into the king's hands as forfeited; and forasmuch as the said
 " judgment and the proceedings thereupon is and were illegal and
 " arbitrary; and for that the restoring the said mayor, and
 " commonalty, and citizens to their ancient *liberties*, of which
 " they had been deprived, tends very much to the peace and good
 " settlement of this kingdom, &c. IT IS ENACTED, that the said
 " judgment for the seizing into the king's hands the liberty, pri-
 " vilege, or franchise of the mayor, and commonalty, and citizens
 " of *London*, of being of themselves a body corporate and politic,
 " &c. is hereby reversed, annulled, and made void to all intents
 " and purposes whatsoever: AND THAT all officers and ministers
 " of the said city, that rightly held any office or place in the said
 " city or liberties thereof at the time when the said judgment was
 " given, are hereby confirmed, and shall have and enjoy the same
 " as fully as they held them at the time of the said judgment given;
 " except such as have voluntarily surrendered any such office or
 " place, or have been removed for any just cause (a)."

It was insisted, that by the judgment in *quo warranto* (if legal) nothing was altered, for execution was never sued forth (b); it was like a recovery in a *quare impedit*, wherein the party has a title to a writ to the bishop; but till then the church is full. Now whether a body politic may be *dissolved* or not, is a question of great consequence, and never yet received any judicial determination; it was a thing not thought on at the dissolution of monasteries, and never attempted but in the late reigns. * But admitting such a judgment could be given, it was not intended that the corporation should be dissolved thereby; for SIR ROBERT SAWYER, who was then *Attorney General*, said, it was only that the king might lay his hands gently on the franchises. It may be objected, that the very essence and being of a corporation consists in its franchises; when these are gone or seized, the corporation is dissolved: but a corporation is not known by such name, nor taken notice of as such by any law-book or author of credit. In the case of *Hey-*

* [54]

(a) By 2. *Will. & Mary*, s. 1. c. 8. " next Term after such restitution, under
 s. 12. it is also enacted, " that all per- " the penalties, forfeitures, disabilities,
 " sons so to be restored and continued, " and incapacities in that act provided."
 " shall take the oaths appointed by (b) 3. Inst. 118. Ryley Placita, 6.
 " 1. *Will. & Mary*, *sess.* 2. c. 8. the 138. 277. 1. Bac. Abr. 510. notii.

Michaelmas Term, 3. William & Mary, In B. R.

SIR JAMES
SMITH'S CASE.
Ld. Ray. 426.
8. Mod. 35.
285.
10. Mod. 65.
216. 296.
11. Mod. 235.
12. Mod. 224.
Fitzg. 82.
Stra. 394. 582.
952. 1090.
1109. 1213.

ward v. Fulcher (a) it is said, that a name and power make a corporation, and this may be either by prescription, patent, or act of parliament. Some writers, and those of no mean account in the law, affirm, that though the king may create a corporation, yet he cannot dissolve it, neither can they dissolve themselves by any voluntary surrender (b); but if any of the members offend against the privileges granted to them, a *quo warranto* may be brought against such offenders only, and not against the body politic (c). They further affirm, that nothing can be seized into the king's hand, but such which was part of the ancient inheritance of the crown, and then it is immediately extinct; or else such things which have an existence and may be restored, as fairs, markets, &c.; that most of the authorities which seem to warrant a contrary opinion happen to be in the latter part of the reign of *Henry the Third*, and between that time and the reign of *Richard the Second*, which were tumultuous times, and most of the corporations were then seized; but then also the king took more or less of the government, as the party offended (d). If the fault was in the mayor, then he ceased the mayoralty and put in a *custos*, which was in order to preserve the corporation; and the writs of restitution were always according to the seizure. It is true, the judgments in *quo warranto* are various; as when the franchises were totally *usurped*, then the judgment is, *quod extinguantur*; but when they are *abused*, it is, *quod capiantur*; which imports a future time, and therefore that the franchises have still a being; and this is the judgment in this very case: but it seems to be contradictory in itself; for the first part of it is, "*quod libertat. et privilegia, &c. capiantur et seisantur in manus regis*;" and the latter part of it is, "*quod capiantur ad satisfaciend. domino regi de fine suo pro ratione libertat. &c.*" Then as to the act of 2. *Will. & Mary*, c. 8. it sets forth, that this judgment was "illegal and arbitrary," which is as much as to say that it had not the form of law; and therefore it is void; if so, the corporation was still in being. Neither can it be objected, that the parliament was of opinion that the franchises were gone by that judgment; for though the act takes notice, "that it would tend very much to the peace of the kingdom to restore the mayor, commonalty, and citizens, &c. to their ancient liberties from which they had been deprived," yet it does not follow from thence, that they were deprived by this judgment; for it might be by force or any other means: nay, it is so far from importing that the corporation was dissolved, that it supposes it to have existence; for it enacts, "That all officers who had rightfully any office at the time of the judgment, shall be confirmed;" which implies, that the *body politic* had then a being, otherwise those words are of no signification.

* [55]

(a) Palm. 491. 501. Sir W. Jones, 266.

(b) See *Rex v. Grey*, 8. Mod. 358.; and *Rex v. Amery*, 2. Term Rep. 530, 531.

(c) See *Borough of Colchester v. Scabear*, 3. Burr. 1266. 1. Bl. Rep. 591.

(d) *Ryley*, 277.

Michaelmas Term, 3. William & Mary, III B. R.

'PEMBERTON, *Serjeant*, argued for a *peremptory mandamus*; and that, by the judgment in the *quo warranto*, the corporation was dissolved; for otherwise the liberties and franchises must remain, which could not be, because *capiantur et seisantur in manus regis*. And this appears more plain from the very nature of A CORPORATION, which is an artificial body, constituted of several members, like a natural body: it is united by its franchises, and it is called a franchise by the very letters patents of incorporation; for all corporations were made by letters patents or acts of parliament, though in some places they prescribe to them; which in itself implies a former grant. If then this *body politic* be a *franchise*, or if the essential part thereof be made up and consist in franchises, then it seems plain, that in all concessions and grants of franchises there is a tacit condition implied in those grants, that the persons to whom they are made shall use them justly; and it is such condition, which if broken will determine the very grant itself. This is one way by which a corporation may be destroyed. So likewise for *misuser* and *abuser*, the whole franchises are forfeited for ever (a). Now the proper remedy for the king to take advantage of such a condition broken is by a *quo warranto*, which is called "the king's writ of right," in which the supposed abuse of * franchises is examined, and either the defendant is acquitted or the franchises *capiantur*, which is the final judgment. It is true, there are two sorts of judgments upon the proceedings on this writ; for if the party make default at the return of the *venire facias*, then the judgment is, "*quod capiantur nomine districtionis*," which is but a temporal judgment till he appear; and it is repleviable; but if the replevin be not brought during that term in which the *venire facias* is returnable, the franchises are for ever lost (b). But if he appear and make out no title, then the judgment is, *quod libertates, &c. capiantur in manus regis, &c.* (c). So that immediately upon the entering of the judgment the party is ousted, and no more liberty remains in him, the franchises being all determined. As for the word "*capiantur*" in the judgment, it cannot be said that it implies any future time when they may be taken, &c. for it amounts in legal construction to *capiantur* (d). So in an *amoveas manum*, it is, "*quod manus domini regis amoveantur*," because when the forfeiture is found the party is immediately out, and the king is then in possession; and so the law has been taken in such cases. Therefore in a *quo warranto* brought against the defendant for the claiming of a court-lect, the judgment was, that it

SIR JAMES SMITH'S CASE;

3. Term. Rep. 205.

* [56]

(a) Year Book, 20. Edw. 4. pl. 5: 2. Inst. 122.

(b) 2. Inst. 282, 283. See Rex v. Amery, 2. Term Rep. 515. 567. that a judgment of seizure *quousque, &c.* against a corporation in default of appearance, operates as a final judgment to

dissolve the corporation, if they do not appear in the same Term, or the next at farthest.

(c) Year Book, 15. Edw. 4. pl. 7. Co. Entries, 527. Rex v. Stavertons Yelv. 190.

(d) 9. Co. 98. n.

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SIR JAMES
SMITH'S CASE.

8. Mod. 135
Ld. Ray. 836.
1407. 1559.
Sua. 621.

57]

8. Vern. 173.
10. Mod. 124.
354. 409.
12. Mod. 176.
418. 542.

should be seized for misfeisor (a); and *postea* the defendant "*petit rehabere per finem, et ei conceditur*." Now if it had not been taken into the king's hands, what need was there of the words "*rehabere, et ei conceditur*," as in the entry of that judgment? Some judgments in this proceeding are entered more at large (b), "that the liberties, franchises, and privileges in *manus dominæ reginæ seifantur*, and that they remain in her hands, &c." "*Et quodammodo eadem libertates franchise et privilegia extinguantur amoveantur*," and that the offenders *capiantur* to satisfy the queen "*de redemptione suâ pro usu et usurpatione suis super dictam dominam reginam de libertatibus, &c.*" But by the words "*capiantur in manus regis*," which is the usual form of the entering of the short judgment given in such cases, all the franchises are gone; and so the law has been constantly taken to be (c). One of the questions put in *Sir George Reynell's Case* (d) was, Whether upon the forfeiture of the office of THE MARSHALSEA, the king could seize it without a *scire facias* first brought? And the LORD CHANCELLOR having asked the Judges who assisted him * how a seizure might be made, LORD COKE answered, that by an inquisition and award of seizure the king is in possession, without any other writ or commission for that purpose; which shews, that by the word "*capiantur*" there is a final judgment, and the franchises are dissolved. There are but three cases which can be cited out of all the law-books to prove, that there ought to be a *scire facias* before the king can make a seizure; and these are, in the *Year Book* (e), the *Second Institute* (f), and in *Ryley* (g); which cases are not to this purpose; for it is true, as my Lord Coke has observed upon the statute of *Articuli super Churtas* (h), that if an *ouster le main* be brought, and afterwards a precedent record be found to maintain the king's title, he cannot re-seize without a *scire facias*: the reason is, because he was out of possession, and by the office so found, his title accrued before the livery: but where a judgment is final, as in this case, the franchises are then actually in the possession of the king, and the corporation is dissolved; for the liberties which united the *body politic* are taken away, and then it is but as one single person, nothing being left to distinguish them by the name of "mayor, aldermen, &c." and therefore there needs no *scire facias* in such cases. That the corporation was dissolved appears yet more fully by the statute 2. *William & Mary*, c. 8. mentioned before; for thereby the judgment is declared to be illegal; and in the preamble it is said, "that it would tend very much to the peace of the kingdom to restore the mayor and citizens, &c. to their ancient liberties, of which they had been deprived." Now it is a very foreign construction to say, that they might be deprived by force, and not by that

(a) Rafta's Entries, 540.

(b) Coke's Entries, 539. 560.

(c) Year Book, 15. Edw. 4. pl. 7.

(d) 2. Roll. Abr. 153.

(e) 6. Edw. 2. pl. 2.

(f) 2. Inst. 572.

(g) Ryley's Placita Parliamentaria, 168, 169.

(h) Inst. 572.

judgment,

Michaelmas Term, 3. William & Mary, In B. R.

judgment, when it is plain that it was the opinion of that parliament, that they were deprived of their liberties by that judgment, for otherwise those words are void. If therefore by this judgment the corporation was dissolved, then *Sir James Smith* was no alderman at the time of the making the act of 2. *Will. & Mary*, c. 8. and having no office * at that time, is not therefore obliged to take the oaths; and though he has not taken them, yet he ought to be restored.

SIR JAMES
SMITH'S CASE.

* [58]

CURIA. A corporation may be dissolved; for it is created upon a trust, and if that be broken, it is forfeited; but a judgment of seizure cannot be proper in such a case, for if it be dissolved, to what purpose should it be seized? Therefore by this judgment in the *quo warranto* the corporation was not dissolved; for it neither extinguishes nor dissolves the *body politic*. Wherever any judgment is given for the king for a liberty which is usurped, it is, *quod extinguatur*; and that the person who usurped such a privilege, *libertat. &c. nullatenus intromittat, &c.* which is the judgment of *ouster*; but the *quo warranto* must be brought against particular persons. But where it is for a liberty claimed by a corporation, there it must be brought against the body politic; in which case there may be a seizure of the liberties, which will not warrant either the seizure, or dissolving of the corporation itself (a). Therefore the corporation being not dissolved, *Sir James Smith* was still an alderman, and ought to take the oaths before the first day of *August*.

8. Mod. 358.
10. Mod. 346.
11. Mod. 101.
Ld. Ray. 266.
499.

And so judgment was given in *Hilary Term* following, that no *peremptory mandamus* ought to go.

DOLBEN, *Justice*, doubted upon the main point; for it seemed to him, that if the *liberties* of the city were seized, then *Sir James Smith* was no alderman, &c. and that the parliament of 2. *William & Mary*, c. 8. did affirm the judgment to be of force, for they did not declare it to be void *ab initio*, but illegal.

(a) Cro. Jac. 160. Year Book, 15. *Edw.* 4. pl. 7.; and Walker's Case, 3. Co.

Jefferies against John Legendra.

Case 23.

AN ACTION ON THE CASE was brought by the plaintiff upon a policy of assurance of goods from *London* to *Naples* upon the ship called THE OLIVE-BRANCH. The adventure was to begin at the time of the lading of the ship at *London*, and seven guineas was the premium for every one hundred pounds insured, dangers of the seas only excepted. At the bottom of this policy, the words "war-ranted to depart with convoy" mean, that the ship shall depart with convoy for the voyage; and therefore if a ship without fraud depart with convoy, and they are separated by stress of weather, and the ship insured is lost during the separation, without any default in the captain, the terms of the policy are complied with, and the underwriters liable.—S. C. 1. Show. 320. S. C. 3. Lev. 320. S. C. Salk. 443. S. C. Holt, 465. S. C. Carth. 216. 2. Vern. 176. 269. 716. Prec. Ch. 20. 8. Mod. 66. 230. 10. Mod. 77. 287. 12. Mod. 325. 2. Peer Wms. 170. Comy. 360. Stra. 1173. 1183. 1199. 1236. 1250. 1264. Doug. 74.

E 3

policy,

JEFFERTES
against
LEGENDRA.

policy, these words were subscribed, upon which the question now arose, *VIZ.* "*warranted to depart with convoy.*" * The plaintiff in his declaration averred that the ship did depart with convoy; that she was taken by *the French*; and that the defendant had notice of it, but did not pay the money, &c.

Upon *non assumpsit* pleaded, THE JURY found a special verdict to this purpose, *viz.* They find THE POLICY of assurance; that the defendant subscribed it; that the ship departed out of the River Thames under the convoy of a man of war (a); that about the *Isle of Wight* she was separated from the convoy by bad weather, and put in at *Terbay*, and was there detained by contrary winds; that the master of the ship expecting to meet the convoy departed out of the harbour, but could not meet her, being hindered by stress of weather; and that the ship was taken by *the French*, and so lost, &c.

The question was, What the true meaning of those words are, *VIZ.* "*warranted to depart with convoy?*"

THE COUNSEL for the plaintiff would have it that no more was intended than a departure with convoy at the first setting out of the River; which being provided by the insured, and so found by the verdict, they had fulfilled their warranty, and so ought to recover: That what was afterwards done by the master of the ship in coming out of the harbour, ought not to prejudice the plaintiff; for the master is in nature of a *common carrier* to convey goods from one part to another; but as it is found by the jury, he did not misbehave himself, for he came forth to meet his convoy, and did endeavour it, but was hindered by the weather. These words imply a *mutual covenant*; and the rather, because they come in the conclusion of the policy. But admitting it to be a *condition precedent*, the plaintiff has performed all he ought to do, for it is expressly found that the ship did depart with convoy. Suppose the words had been, "*warranted to depart with convoy, and so to continue to the end of the voyage, dangers of the seas only excepted,*" if the ship should happen to be taken by the enemy, that is a danger at sea; or if the convoy leave her, being commanded another way by the king; or if she is assaulted and will not fight; the insurers shall lose nothing in either of * these cases: the meaning of these words are, that all necessary care shall be taken to preserve the ship, which was done by the plaintiff; therefore he ought to recover.

E contra. By these words the ship ought to go all the way with convoy, and not only out of the mouth of the River, where there is no danger, for that could never be the meaning or intention of the parties, and that she should be left at sea, where there is danger (b). Now a policy of assurance is but a *parol contract*, and must be construed according to the minds of the parties, and not according to the strict sense of the words (c). As if a man cove-

(a) See *Hibbert v. Pigou*, Park. Inf. 32; *Gordon v. Motley*, 2. Stra. 1265.

(b) See *Lilly v. Ewer*, Dougl. 74.

(c) See *Park. Insur.* 30.

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nant to make such a voyage, and to bear all losses (except perils at sea), and the ship be taken in the voyage *per quosdam ignotos homines et bellicosos*, such taking by pirates is held to be perils of the sea (a). When a person is obliged to secure a thing under such terms and circumstances, the manner of the promise must be observed and pursued; as if I promise to pay five pounds to another, sending his servant to me such a day; if he do not send his servant, the obligation ceases on my part. So if a promise be made to deliver goods in *London*, and for that purpose they are put in a boat, which is afterwards drowned, notwithstanding the party used his endeavour, that shall not discharge him, because he having undertaken to do the thing on his part, he ought to perform it (b). It is found by the jury, that the master of the ship departed out of the harbour, expecting to meet the convoy, which must be to sail with her and protect her the rest of the voyage, or otherwise a convoy will signify very little or nothing. Here was a severance by bad weather: now the ship might have come up to the convoy, or that to the ship; but she did not stir out of *Torbay* till the ship was taken; therefore the insured being to provide a convoy, here is a breach of the agreement on their side, which will hinder them from bringing this action, especially since it is an entire agreement, and no precedent condition.

JEFFERIES
against
LEGGERA.

Ld. Ray. 909.
918. 1007.
10. Mod. 294.
12. Mod. 480.
Comy. 136.
Stra. 128.

CURIA. If the insured have acted contrary to the agreement, the policy fails as much as if there had been a deviation. The word "depart" is only *terminus à quo*; if the ship had departed from *London*, and come back again by fraud, that had been no departure within the intention of this agreement. * But upon this departure, as it is found, the voyage was begun with convoy; they were afterwards separated by stresses of weather, and both endeavoured to save themselves, and afterwards to find out each other. —And there being no fraud found in the master, judgment was given for the plaintiff, though it might have been otherwise if the convoy had run from the ship, and by that means she had been taken (c).

• [61]

(a) *Pickering v. Barkley*, Stiles 132, S. C. 2. Roll. Abr. 248.

(b) *Thompson v. Miles*, 1. Roll. Abr. 450. pl. 9.

(c) See the case of *Victoria v. Clevea*, 2. Stra. 1250.; *Lilly v. Ewer*, Dougl. 72.; *Taylor v. Woodness*, Park. Insurances, 349.

The King and Queen against Anonymous (d).

Case 24.

THE DEFENDANT, some years since, killed one J. S. and fled for the same. He appeared; and was tried the last assizes in *H.* and found guilty of murder; and being brought to THE BAR, he *insuance*, be pleaded in bar to judgment, although the offence be pardoned by the express name of murder, and there is no non obstante of the statute of 13. Rich. 2. c. 1.—*Moor*, 752. 3. Inst. 236. Stiles, 375. 1. Keb. 67. 1. Lev. 8. Dyer, 34. 2. Jones, 56. 1. Show. 283. 3. Mod. 375. Mod. 386. 12. Mod. 13. Ray. 13. Ld. Ray. 158. 214. 709. 2. Stra. 997. 5. Bac. Abr. 743. 806. 2. Hawk. P. C. ch. 37. f. 14.

(d) This seems to be the case of *Rex v. Parsons*, 1. Show. 283. Holt, 519. 2. Salk. 499.

E 4

pleaded

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THE KING
AND QUEEN
against
ANONYMOUS.

pleaded his pardon; in which pardon *the verdict* was inserted. The writ of allowance, which is the warrant remaining in court for the Judges to allow the pardon, was then read, reciting the pardon; and fureties found, according to the statute of 10. *Edw.* 3. c. 2. (a),

AND NOW several reasons were offered by Counsel against the allowance, of the pardon: for as the law now stands, he said, with some heat (b), that it was *casus primæ impressionis*. It appears by the very pardon, that upon *not guilty* pleaded, the jury have found the defendant *guilty* of murder; then comes the pardon, and after the recital of the offence, it is "*SCIATIS, &c. quod nos pietate moti pardonavimus murdrum, &c.*" Now the kings of England have been always so far from the pardoning of murder by express name, that formerly they did not so much as pardon homicide but in very soft and gentle words, as "*scilicet pacis nostræ quæ ad nos pertinet de homicidiis (c).*" In the Register there are forms of writs of allowance, where the king extends his mercy to murderers *per infortunium*, but no such writ of allowance for murder; for it is a crime for which no mercy should be shewed; and this appears by THE CORONATION OATH, part of which is, that "the king will shew mercy where it ought to be;" which implies, that in some cases mercy ought not to be shewn. And if in any case, then certainly in this, for here is nothing pardoned but what appears to be *ex malitiâ præcogitata*, which cries for justice, and not for mercy (d). The ancient laws were so tender of pardons even for homicide, which is an offence of far less guilt, that the * statute of 2. *Edw.* 3. c. 2. was made to prohibit such charters but where the king might grant them by his oath; that is, where a man was killed *per infortunium*, or in his own defence. Two years afterwards, in the fourth year of Edward the Third (e), another law was made, taking notice that pardons had been granted contrary to the former act, and thereby it is declared that no man shall be pardoned but in parliament. And because kings had been deceived by false suggestions, and had thereupon dispensed with these statutes, with a clause of *non obstante* inserted in the pardons; therefore the statute of 27. *Edw.* 3. c. 2. was made, which provides, "that in the pardon shall be contained *the names* of those persons at whose suggestions it was obtained, "which if found false, the pardon is not to be allowed." Afterwards, upon the grievous complaint of the commons of England against such pardons, the statute of 13. *Rich.* 2. c. 1. was made, by which it is expressly enacted, "that all pardons for

(a) This statute is repealed by 5. & 6. *Will. & Mary*, c. 13. which enacts, "that if any charter of pardon be pleaded by any person for any felony, the Justices, before whom such pardon shall be pleaded, may, at their discretion, remand or commit such person to prison, there to remain until he or she shall enter into a recognisance, with two sufficient fureties, for his or

"her being of the good behaviour for any term not exceeding seven years."

(b) Sir Francis Winnington.

(c) 3. Inst. 235.

(d) See *Rex v. Huggins*, Fitzg. 177. 187.

(e) 4. *Edw.* 3. c. 13. See Sir W. Staundford's *Pleas of the Crown*, 100. b. 101. a.

"murder shall be disallowed." But by the iniquity of later times, *non obstante* have been used to dispense with these statutes, which my Lord Coke (a) calls excellent laws for the realm, but by this means they are made ineffectual, though grounded upon the law of God. It is observed by that Judge, that before the making of that statute of 13. Rich. 2. c. 1, a pardon of felonies would discharge not only *treason* but *murder* likewise; therefore it was enacted by that law, that the offence committed shall be specified in the pardon of *murder* by express name; because if it should be specified as such in the letters patents, the parliament did believe the king would never pardon it. But, notwithstanding the new invention of *non obstante* to those statutes, my Lord Rolle, in giving judgment in *Ricabie's Case* (b), said, that the king could not dispense with this statute, no more than he could with buying and selling of offices contrary to the statute of 5. & 6. Edw. 6. c. 16. because it concerns justice, and was made for the advancement thereof, which the king has promised to observe; and that such manner of pardoning was contrary to the known and settled practice for two hundred and six years, and never heard of before *Spencer's Case* (c), which was carried with a strong hand, and *pro hac vice tantum*. But admit the law and practice to be so formerly, yet now by the statute of 1. William & Mary, c. 2. which is penned by way of declaration, "the pretended power (as it is there called) of * dispensing with laws, or the execution thereof by regal authority, is declared illegal." If therefore by this law *non obstante* are taken away, nobody will affirm that this pardon can be good without such clause (d).

THE KING
AND QUEEN
against
ANONYMOUS.

* [63]

CURIA. . A general *non obstante*, without a particular recital of the crime for which the party is convicted, is not good since the making the statute of 13. Rich. 2. c. 1. (e). But at the common law, both before and since that statute, the king may pardon murder with a special recital of the fact, *non obstante* that or any other statute (f). For suppose a bastard-child should be born dead, and the mother conceals it, and it is afterwards discovered that she had such a child; if she cannot prove by one witness that it was born dead, it is murder in her by the statute 21. Jac. 1. c. 27.; but it would be a very hard case, if, upon such circumstances, the king should not have a power of pardoning. The statutes which have been cited, are only to prevent the frequency of pardoning; they do not take away the king's prerogative, but prescribe certain forms, that charters of pardon may not be so easily granted, and that by such means the king may be apprised of his grants; for before the making of those statutes, the parties got inquisitions to find the

(a) 3. Inst. 236.

(b) March, 213. Stiles, 369. 375.

(c) Dyer, 133.

(d) See Rastall's Ent. 455, 456.

(e) Dudley's Case, 1. Sid. 336.

(f) By 1. Will. & Mary, st. 2. c. 2.
an act for declaring the rights and liber-

ties of the subject, it is enacted, "that
" no dispensation by *non obstante* or
" to any statute, or any part thereof, shall
" be allowed, but that the same shall be
" held void and of no effect, except a
" dispensation be allowed in such sta-
" tute."

fact

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AND QUEEN
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ANONYMOUS.
12. Mod. 119.

fact homicide, and thereupon got pardons out of the chancery, *ex merito justitiæ*, without applying themselves to the king; which was prevented in these statutes. Now what necessity was there of such regulations in the manner of pardoning, if, at the common law, the king had no power to pardon murder?

The pardon was allowed.

* [64]

Case 25.

Beak and Others against Kent.

Trinity Term, 3. Will. & Mary, Roll 357.

In *assumpsit* against an executor, if the defendant pleads several judgments recovered, and no assets *ultra*, and the plaintiff reply *per fraudem* to each judgment separately; the plaintiff may rejoin generally, that the said judgments were not kept on foot by fraud; and need not traverse each judgment separately.

INDEBITATUS ASSUMPSIT brought against an executor, &c. for wares sold. The defendant pleaded several judgments, &c. and that he had no assets *ultra*. * The plaintiff replied particularly to each judgment, and that they were kept on foot by fraud. The defendant in his rejoinder put all the judgments together, and said they were not kept on foot by fraud. The plaintiff demurred.

The question was, Whether the defendant should have made several rejoinders to all the judgments in particular, and not have put them all together? like the case of *Warkhouse v. Symonds* (a), which was an *indebitatus assumpsit* for fees, the defendant pleaded several judgments, as here, &c. and the plaintiff made the like replication; then the defendant rejoined and said, that the judgments were all satisfied, and that he did not keep *separalia judicia prædicta* on foot by fraud (and had left out *nec aliquod eorum*): and, upon a demurrer, judgment was given for the plaintiff in the court of common pleas, which was affirmed upon a writ of error brought in the king's bench.

S. C. 1. Show.
239.
S. C. Carth.
195.
S. C. Holt, 455.
Skin. 299.
3. Mod. 288.
10. Mod. 324.
Stra. 732. 1028.
Id. Kay. 263.

CURIA. The plaintiff need not aver in his replication, that every judgment, but that *separalia judicia prædicta* are kept on foot by fraud; which had been a good averment, and then this rejoinder had been likewise good. If the jury had found but one judgment kept on foot by fraud, there must have been a verdict for the plaintiff, because sufficient matter of the issue would be then found for him; for it is enough if the substance intitle the plaintiff to an action, and avoid the defendant's plea. As in the case of *Roberts v. Andrews* (b): Waste was brought against the defendant for cutting of twenty oaks; the defendant ought to plead that he did not cut the twenty oaks, or any of them; but if an action of debt had been brought on a bond conditioned, that the obligor shall not do waste, and the breach assigned that he did cut twenty oaks, it is sufficient to say that he did not cut the said twenty oaks *modo et formâ*, &c. for if it be found that he cut one oak, it is enough to forfeit the obligation. So in a *scire facias* upon a

(a) Cro. Jac. 625. 1. Roll Abr. (b) Cro. Eliz. 84.
302.

Michaelmas Term, 3. William & Mary, In B. R.

judgment against *tertenants* who pleaded several pleas, and the plaintiff replied *quoad separalia placita*, &c. without saying *quoad placitum* of the one, and so of the other particularly; for the words *separalia placita* shall refer to each plea, *reddendo singula singulis* (a).

BRANK AND OTHERS
against
KENT.

(a) It is stated by *Carshew*, that the plaintiff, perceiving the opinion of the Court to be that the rejoinder was good, obtained leave to *discontinue*. 3, C. Carth. 196. S. C. Holt, 546.

* [65]

* The King and Queen against Warrington and Another.

Cafe 26.

AN INFORMATION was brought against three for a riot committed in *Chester*; and one of them being then sheriff of the city, the *venire facias* was directed to the other sheriff.

If one of the sheriffs of a city be indicted, the *venire facias*, on a suggestion entered on the roll, shall be directed to the other sheriff, and not to the coroner.

Upon a motion it was objected, that it was not well awarded, for it ought to go to THE CORONER. It has been so where the sheriff was plaintiff in an action, and returned a *tales de circumstantibus*; for the array in that case was quashed, and process was awarded to THE CORONER (a). The reason seems to be, because the sheriffs of a city or county are but one officer, though they are distinct persons; and whenever any writ is directed to them, it must be returned by both (b); for it is not sufficient that one should make the return when the other is dead, because there are not those sheriffs to whom the writ was directed.

S. C. Salk. 152.
S. C. Carth. 214.
S. C. 1. Show. 327.
S. C. Comb. 191.
S. C. 12. Mod. 22.
S. C. Holt, 166.
1. Roll. Abr. 667.
Dyer, 367.
Co. Lit. 157.
8. Mod. 193.
247. 304.
10. Mod. 198.
Stra. 253.
Ld. Ray. 1135.
3. Petr Wms. 55.
Cowp. 112.
2. Term Rep. 83.

E contra. There being a suggestion made upon THE ROLL that one of the sheriffs is a party, the *venire facias* is well directed to the other. Coroners of a city are but one officer in law, as well as sheriffs, to execute writs; but if one of them should be challenged in *London*, the writ may be directed to the other.

CURIA. If one should die, the Court can award no process to the other. If confuance of pleas be granted to be held before two bailiffs of a corporation, and an action should be brought against one of them, that person against whom it is so brought, shall not have confuance of this matter, for that would be to make him judge in his own cause. But if one of them should be plaintiff in an action, the plea shall not be removed for that cause (c), for they being both judges of record by virtue of a grant from the king, one of them may therefore in such case be both judge and party; but the defendant may except against such proceedings, and then the plaintiff must stay till he is out of his office. * It is customary in ancient corporations where the bailiffs are judges, that they are officers also as to executing of process (d). There is a case (e) which seems to warrant the objection now made: it was an action brought in the city of *Bristol* for a rescous. An exception was taken in ar-

* [66]

(a) Year Book 3. Hen. 6. pl. 12. ;
and Bro. Abr. "Proccs." pl. 58.

(b) Year Book. 14. Hen. 4. pl. 34. ;
and Bro. Abr. "Return" pl. 42.

(c) Year Book, 2. Hen. 4. pl. 4. ;
and 1. Roll. Abr. 492.

(d) Crane v. Holland, Cro. Car. 138.

(e) Gough v. Cann, Siles, 342

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THE KING
AND QUEEN
against
WARRINGTON
AND
ANOTHER.

rest of judgment, that (one of the sheriffs being of kin to the plaintiff) the *venire facias* was awarded to the coroners, when it ought to have been to the other sheriff; but the exception was not allowed, as appears by the Book, for judgment was given there for the plaintiff.

But in *Easter Term* following judgment was given in this case, that the *venire facias* was well awarded to the other sheriff, and that it had been formerly so resolved in the court of king's bench in the case of *Sir Peter Rich v. Sir Thomas Player* (a).

As to the objection, that they are but one officer in law, it is plainly otherwise; for where one is challenged, the other shall supply that defect, and not the coroner; for he is not the person to execute the process of this court, but only where the proper officer is wanting (b), which cannot be where there is one sheriff.

* [67]

(a) Skin. 102. 2. Show. 262. 286. (b) Year Book, 22. Hen. 6. 51. b. pl. 17.

Case 27.

Thomas *against* Howel.

Trinity Term, 3. Will. & Mary. Roll 257.

On a devise of lands made "to my daughter A. and her heirs, upon condition that she, on or before her age of twenty-one, do consent to marry B.;" PROVIDED she shall refuse to marry B. at or before her age of twenty-one, or in the mean time shall marry any other person, the said bequest shall be void;" if B. die without requiring A. in marriage, she shall have the estate, although she afterwards marry before she is of the

ERROR to reverse a judgment for the plaintiff in *ejectment*. Upon a special verdict found at the grand sessions of *Caermarthen*, the case was thus:

Zachary Thomas being seised in fee, &c. had issue three daughters, *Jane*, *Mary*, and *Sarah*; and, having several estates in three several places, viz. *Lawborne*, *Eglis*, and *Kiffick*, devised *Lawborne*, which was the best part of his estate, to *Jane* and her heirs, "upon condition, that she at or before her age of twenty-one years do consent to marry *Theophilus Thomas*," who was nephew to the testator. Then he devised *Eglis* to *Mary*, and *Kiffick* to *Sarah*, in which will there was a proviso to this effect: "PROVIDED NEVERTHELESS, and my will is, that in case my daughter *Jane* shall refuse to marry my nephew *Theophilus Thomas* at or before she shall be of the age of twenty-one years, or in the mean time shall marry any other person, the devise to her and *Mary* shall be void." And then he devised *Lawborne* to *Mary* his second daughter and her heirs, and *Eglis* to his eldest daughter *Jane*, and so to his third daughter severally, "upon condition that they marry the nephew." Then follows this clause: "But in case neither of my said daughters marry my said nephew, then also the estates given to them in *Lawborne*, shall be void, &c." Then he devised *Lawborne* to six trustees, that they, within nine months after his decease, should divide it equally amongst his three daughters, or in such manner as the said trustees should think fit. The jury found, that the testator died of the age of twenty-one, and although the testator, by a subsequent clause in his will, had declared, "that A. shall not have the estate if she do not marry B."—S. C. 2. Eq. Abr. 361. S. C. Holt, 225. S. C. 1. Salk. 170. S. C. Skin. 301. 319. 1. Vern. 20. 83. 223. 354. 512. 2. Vern. 293. 357. 580. Prec. Ch. 227. 348. 562. Gilb. E. R. 26. 12. Mod. 182. 1. Peer Wms. 284. 2. Peer Wms. (626). 3. Peer Wms. 65. Cases T. T. 214. Comy. 726. Id. Ray. 112. 280. seised,

Michaelmas Term, 3. William & Mary, In B. R.*

ceased, &c. ; that *Jane* entered upon *Lawborne* ; that *Theophilus Thomas* died before he was twelve years old, and unmarried ; that he did not require *Jane* in marriage ; that she did not refuse to marry him ; but that at the age of seventeen she married the lessor of the plaintiff.

THOMAS
against
HOWELL.

Upon this verdict, judgment was given below for the plaintiff ; and PEMBERTON, *Serjeant*, and MR. FINCH, as it was said, having given their opinions that the estate of *Jane* was determined, therefore this writ of error was brought.

The question was, what the testator intended by this devise ; Whether *Jane* should have the estate, if she was never required, or refused to marry the nephew ? or whether her estate was determined if she did never marry him, as she did not ?

It was argued, that her estate was lost by marrying another person ; and this was collected from the different penning of the conditions ; for *Jane* was not to have the estate “ if she refused, &c. or if she married any other person.” Then when he devised it to *Mary* the second sister, he did not put it upon her refusal, but generally upon her not marrying ; so his meaning must be, that if his two daughters, contrary to his direction, should not marry the nephew, then their estate should go to the youngest ; and if none of them should marry him, then to be equally divided, &c. * He had no more kindness for one daughter than for the other ; and it appears throughout the will, that he intended only the advancement and propagation of his own name ; and if that failed, then the estate was to be divided.

* [68]

E contra. If this construction should be made of the will, then the youngest daughter, to whom the least share of the estate was intended, will have the most ; for she will have her own part, which was never stirred by the devise, and a third of the other part without any default in her sister ; and the case will be very hard upon the second daughter, for, according to this interpretation, she must lose her estate if she do not marry the nephew, though she is never asked, and never refused. Neither was it the chief intent of the testator to keep the land in his own name, for then he would have given it to his nephew in the first place, upon whose death THE PROVISIO is determined, and all that comes after is made impossible. His meaning could not be to restrain his two daughters from marrying other men, if the nephew should refuse them ; so that the words which follow, “ if she marry any other,” must be intended, “ if she marry any other, and thereby make herself incapable to marry him ;” and the rather, because the next condition is, that if the second daughter do not marry him, &c. then, &c. but not if she marry another. Suppose the nephew had married the second daughter after the first had given her consent to marry him, the estate of the eldest sister would not have been determined, because there would have been no fault in her.

CURIA.

Michaelmas Term, 3. William & Mary, In B. R.

THOMAS
against
HOWELL.

* [69]

Fitzg. 214-224.
199. 298.
Ld. Ray. 269.
m 54-

THREE JUDGES for affirming the judgment in *Trinity Term* following.—All wills are to be expounded according to the intent of the testator, collected out of the words of the will. Now it plainly appears that the eldest should have *Lawborne*, if there was no defect in giving her consent to marry the nephew, which by the act of God was afterwards made impossible; and therefore she shall not be divested of her estate, being no wilful fault or refusal in her. Thus it would stand upon THE PROVISIO, if there had been nothing farther added in the will; and as to the clause which follows, that makes no alteration in this case, because it refers * to the same matter, and being in a will, shall not be construed or taken in a larger sense than THE PROVISIO itself: and this is proved by the authorities following. A man, having lands in three places, devised all to his son *John* in fee; and if he died without issue, then he devised his lands in *Ham* to *Henry* his nephew, and died; *John* entered and made a devise of the lands, and died without issue; and it was adjudged (*a*), that this was no countermand of the first devise to *John*, *quoad* those lands in *Ham*, but a limitation by way of remainder to *Henry*. So where an estate is given in a precedent clause by will, it shall not be altered by any subsequent clause in the same will (*b*). But in deeds it was admitted, that subsequent clauses which are general, shall be governed by precedent clauses which are more particular (*c*); as if a man make a lease for years, and then give a bond with condition, that if he suffer the lessee quietly to enjoy without any trouble from him, or any other person, then the obligation to be void, here the word "suffer" rules the whole sense, and though a stranger should enter, the bond is not forfeited. So in debt upon a bond (*d*) entered into by the bailiff of a hundred, with condition to make a return of "all warrants, &c." he pleaded performance, &c.; and the plaintiff replied, that being sheriff, process was directed to him to levy issues, and that he made a warrant to the defendant, which he did not return; and, upon a demurrer, the replication was held ill, because he did not shew that the issues were to be levied within the hundred, &c.; for though the words in the condition are general, *viz.* "all warrants," yet it shall be intended of such only which are to be executed within the hundred (*e*).

* [70]

But GREGORY, *Justice*, was of a contrary opinion, *viz.* that the judgment below ought to be reversed, because *Jane* the eldest daughter had not an absolute estate in fee, but determinable by way of limitation; for there was no clause in the will, that either of his daughters should have *Lawborne*, but upon condition that they marry the nephew, which is a limitation of their estate. And to prove this, he cited this case: * The (*f*) testator devised to his eldest son certain lands in fee upon condition, that if he did not

(a) Cro. Jac. 290. Yelv. 209. Moor, 124.

(b) Cro. Car. 396.

(c) 2. Roll. Abr. 396.

(d) Allen, 10. 2. Saund. 413.

(e) But see the opinion of HOLT, Chief Justice, S. C. Skin. 319.

(f) Cro. Eliz. 833. 1. Roll. Abr. 411. Moor, 644. Vaughn, 271.

Michaelmas Term, 3. William & Mary, In B. R.

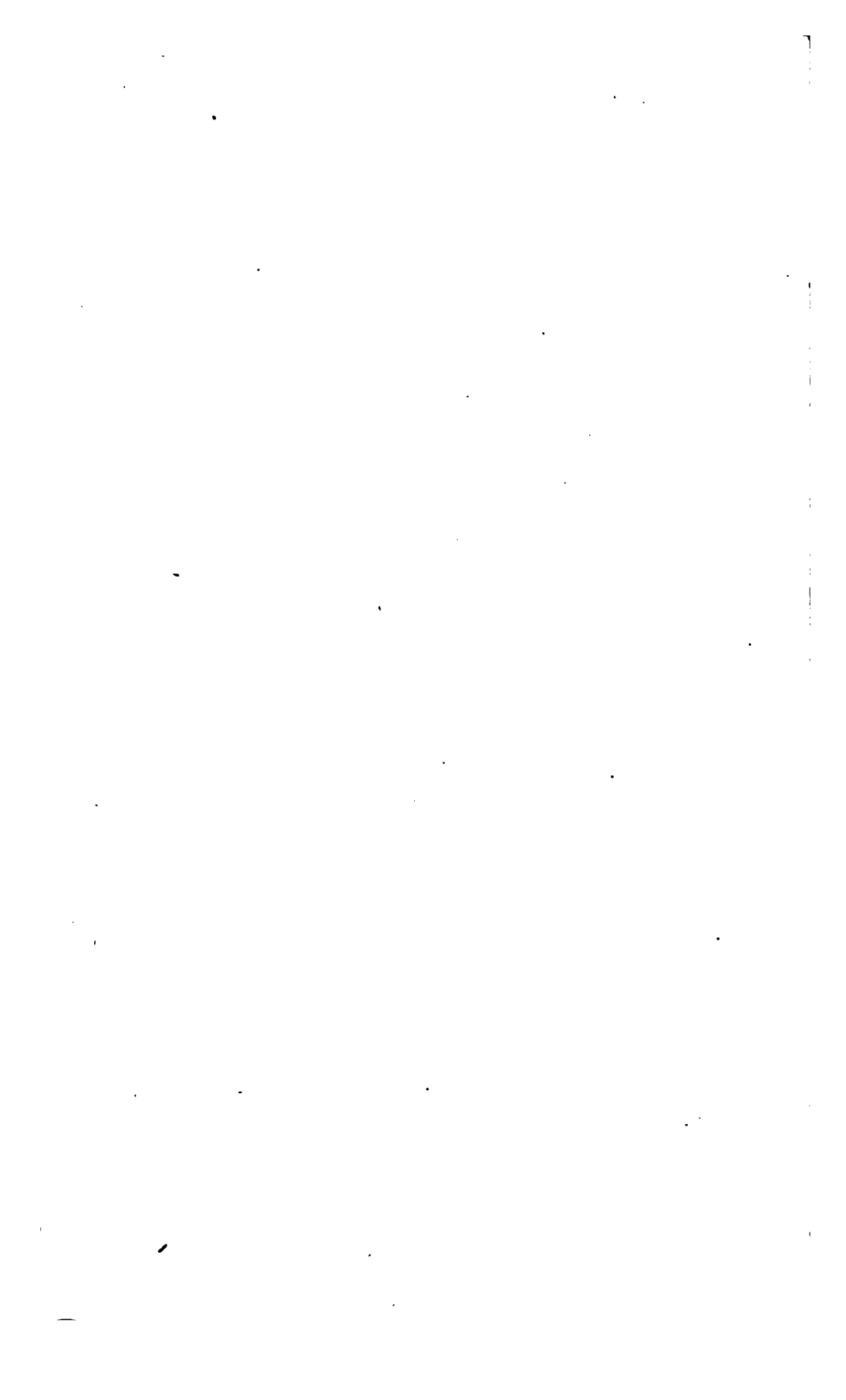
pay the legacies given by the will, that then his youngest son should have the lands, &c. ; and this was adjudged a future devise to the second son, and good in case of non-payment of the legacies ; and though it was void as to the eldest son, it being no more than what the law gives him, yet if it had been a good devise to him, it is a limitation of his estate ; and therefore if he do not pay the legacies, the second son will have it.

THOMAS
against
HOWELL.

Ld. Ray. 728.
Prec. Ch. 222.
Stra. 491.

THE JUDGMENT was affirmed.

HILARY



HILARY TERM,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

* Pitcher against Tovey.

Trinity Term, 3. Will. & Mary, Roll 61.

* [71]

Case 28.

ERROR to reverse a judgment given in the common pleas in an action of covenant, wherein the plaintiff declared, that she was possessed of certain houses in *St. Martin's Lane* for a certain term of years, and that she demised the said houses to *Richard Gill* for twenty-one years under a certain rent, which he covenanted to pay; that before the sealing of the lease, it was indorsed for the payment of twelve bottles of canary wine every year to *Christian Tovey* the lessor, &c.; that the lessee entered, &c. and made his will, and did thereby constitute *Susan Gill* sole executrix thereof, and soon after died; that the said executrix proved the will, and entered upon the premises, and assigned the term to the defendant *Thomas Pitcher*, who entered and was possessed, &c.; that he the said *Pitcher* had not performed the covenants; and assigned the breach in non-payment of twenty-four bottles of sack, which was due for two years, and also for arrear of rent, after the assignment made to him by the said executrix *Susan Gill*. The defendant *Thomas Pitcher* pleaded, that before the said wine and

On a covenant for the lessee and his assigns to pay so many bottles of wine and so much money as a rent; if the lessee die, and his executor assigns the term, the lessor cannot maintain covenant against such assignee, for arrears due after his assignment of the term to another, altho' the lessor had no notice of the assignment made

by the first assignee.—S. C. 1. Salk. 81. S. C. 2. Vent. 234. S. C. 3. Lev. 295. S. C. 1. Show. 340. S. C. Carth. 177. S. C. 12. Mod. 23. S. C. Holt, 73. S. C. 1. Freem. 326. 3. Mod. 325. 338. 3. Co. 24. Cro. Eliz. 715. Moor, 600. Cro. Jac. 334. 2. Bulst. 151. 1. Lev. 308. 2. Mod. 175. 1. Freem. 336. 2. Vern. 241. Prec. Ch. 156. Stra. 405. 2221. Ld. Ray. 320. 368. 554. 1551.

PITCHER
against
TOVEY.

rent became due, he assigned his interest to *James Mott*; * but did not plead notice given to the plaintiff, or that she had accepted the rent. And upon a demurrer to this plea, judgment was given, in the common pleas, for the plaintiff.

A WRIT OF ERROR was brought in the court of king's bench, and the common error assigned.

The questions both in that court, and in the king's bench were,

FIRST, Whether the defendant *Pitcher* ought to have pleaded, that he had given the plaintiff *Tovey* notice?

SECONDLY, If such notice was necessary, yet whether this action would lie against the defendant after this assignment made by him to *Mott*, &c.

THOSE WHO ARGUED for the plaintiff in the action would have the defendant still liable, notwithstanding the assignment, without he had pleaded notice thereof; because otherwise the plaintiff could not tell against whom to bring the action, or where to have his remedy: for if he sue a wrong person, he must *discontinue* and pay costs, and he cannot bring it against the right one, without having notice who he is. This was the very reason of the judgment given in the case of *Kighley v. Bulkley (a)*, which was an action of debt brought for rent by an assignee of the reversion against the assignee of a term, who pleaded, that he had assigned over his interest, but not that he had given any notice of the assignment. It is true, he was adjudged to be still tenant, because he had not pleaded such notice; but this was contrary to the opinion of *TWISDEN, Justice*; for in pleading such assignments none of the precedents mention any notice, &c. and though the plaintiff may not know against whom to bring an action of debt for his rent, yet he has a better and more proper remedy, *viz.* to distrain. The privity of estate is transferred by this assignment, so that nothing remains upon which notice can be fixed, which is a bar to this action; and therefore the plaintiff ought to have taken notice at her peril; for when an assignment is made, it is publicly known to whom, and the person in possession is always taken to be the assignee. Many instances were given where notice was not requisite; as if the lessee for years give bond to his lessor to deliver quiet possession upon request at the end of the term, * and before that time the lessor assign the reversion, yet at the end of the term possession must be delivered to the assignee without giving notice that he is the assignee (*b*). So where the assignee of part of a term covenanted to repair, and the assignor devised the reversion, and died; the devisee brought an action of covenant against the assignee, and it was held good without giving notice to the devisee of the reversion (*c*); nay the pleading of notice is so far from being necessary in this case, that the defendant might have pleaded *nil de-*

* [73]

(a) 1. Sid. 338.

(b) 1. Roll. Abr. 465.

(c) Godb. 161, 162.

Hilary Term, 3. William & Mary, In B. R.

bet, and have given the assignment in evidence, which was done in the common pleas in the case of *Christy v. Wilcox* (a); and though my lord CHIEF JUSTICE NORTH directed the jury to find the assignment fraudulent, yet upon the special finding, the Court were of another opinion when it was argued. There is a case in *Latch* (b), where an executor of a lessee for years assigned over his term, and the lessor brought an action of debt against the executor for rent arrear after the assignment, who pleaded that he had assigned the term, but did not shew that he had given notice, &c. The plea was held well enough, but the plaintiff had judgment, because the privity of contract did still remain between him and the executor (c), who had no power, by any act which he could do, to change or destroy the action of the lessor. But if the lessee for years himself had made such an assignment, and died, that might have made some considerable difference; for then possibly an action of debt would not have lain against his executor, because that must be maintained against him by the privity of contract, which is removed by the assignment of the testator. It might be well brought against the lessee himself in his life-time upon the privity of contract, and so is *Walker's Case* (d).

PITCHER
against
TOWAY.

SECOND POINT. But here is neither the one or the other, and therefore if it should be necessary on the part of the defendant to plead that he gave notice of the assignment, yet the plaintiff cannot have judgment against this defendant, because the action will not lie; for it must be supported either upon a privity of contract or estate: now there can be no privity of contract pretended between them; for the defendant is only an assignee of an executrix of a term; and there can be no privity in law, for that only lasts so long as the estate continues, and no longer. * And therefore the judgment in the case of *Overton v. Sydall* (e) was relied on in point. It was debt against an executor of a lessee for years, after the defendant had assigned the term; and it was held that it would not lie, because it could not be brought against him upon the contract of the testator, to which he was neither party or privy; nor upon the privity in law, for then the term must be still in him, which was gone by the assignment; and so by consequence the action must fail, which is this very case.

* [74]

ANOTHER OBJECTION was made, that the action being brought as well upon the covenant for the bottles of wine, as for

(a) Trinity Term, 30. Car. 2. Roll. 636.

(b) Latch. 260. Noy, 97.

(c) The case of *Overton v. Sydall*, Cro. Eliz. 555. S. C. Poph. 120. S. C. 3. Co. 24. *Marrow v. Turpin*, Cro. Eliz. 715. S. C. Moor, 600. *sembl. contra*. But in the case of *Coghil v. Freelove*, 3. Mod. 325. it is said, that the late resolutions have been quite contrary to the above cases, and that it is now held, that the privity of contract of

the testator is not determined by his death, but that his executor shall be charged with all his contracts so long as he hath assets, and therefore such executor shall not discharge himself by making an assignment, but shall be liable for what rent shall incur after he hath assigned his interest. See also *Helier v. Casebert*, 1. Lev. 127. S. C. 1. Sid. 266. Litt. 53. *accord*.

(d) 3. Co. 12.

(e) Cro. Eliz. 555.

Hilary Term, 3. William & Mary, In B. R.

PITCHER
against
TOVEY.

rent, and entire damages given, it is naught; because the wine arises in covenant; it is a reservation, and not properly a rent; and so cannot be assigned to the defendant, who is a stranger to this covenant.

E contra. It was agreed by the counsel of the plaintiff, that there is no *privity of contract* in this case, but that there is a *privity of estate* remaining, notwithstanding the assignment, which was not completed till notice. If it should be otherwise, the mischief would be very great; for against whom should the lessor bring an action? If against the under-tenant he may be non-suited, unless he can prove the assignment to him; and therefore in judgment of law the privity must still continue, though *in rei veritate* the estate itself be assigned. The lessor has as much right to his rent, as a patron has to his presentation; now it will not be denied, that if there be a deprivation by the ordinary, the patron must have notice, otherwise the bishop may take an advantage of a lapse by his own act. It is true, if I promise to pay to *A. B.* for goods delivered, so much money as *C. D.* sold the like goods for at such a market, and after this agreement the plaintiff declare, that *C. D.* sold for so much, the action is well brought, without alledging that he gave notice to the defendant that *C. D.* sold for so much, *quia constat de personâ (a)*. But where the person is uncertain, or where the act is to be done by the person to whom the payment is to be made, there notice is necessary (*b*); as if I promise to pay a man so much money when he returns from *London*, there he ought to give me notice of his return; that being the time of payment (*c*). * In this case, if the plaintiff had accepted the rent after the assignment, yet the defendant had not been discharged without notice; so is *Penant's Case* in the Third Report (*d*), where a lease was made upon condition, that the lessee should not assign it without the assent of the lessor; he did assign it contrary to the agreement; and the lessor not having notice, &c. accepted the rent of the lessee after the assignment; but notwithstanding this acceptance, he entered for breach of the condition: and it was adjudged lawful, because it being a collateral condition, notice is material; for otherwise it may be broken so secretly that it is impossible for the lessor to know it; and if notice should not be necessary in such case, then the lessee may take advantage of his own fraud, which the law will not permit. The reason given by *Wray, Chief Justice*, in the case of *Gurney v. Saer (e)*, rules this at bar; which was thus: A man had a reversionary interest to a term of years after the determination or surrender of a lease then in being; they who had the present interest, made a private surrender without giving notice thereof to him in reversion; and for that reason it was adjudged, that it should not be prejudicial to him. The opinion of *Twisden, Justice*, in the case before mentioned (*f*), stands

* [75]

9. Mod. 112.

(a) Henning's Case, Cro. Jac. 432.

(b) 1. Roll. Abr. 463.

(c) 1. Roll Rep. 314. 1. Bulst. 44.

(d) 3. Co. 64.

(e) 3. Leon. 95.

(f) Kightly v. Bulky, 1. Sid. 338.

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single against the other Judges, and the reason by him given, why notice is not necessary, is of very little weight; it is because the plaintiff may *disfrain*, if he cannot tell against whom to bring an action: but if he may have two ways to recover his rent, why should he be defeated of one? The remedy by way of distress may prove ineffectual; for the term may be assigned to a beggar, or to a person who may suffer the houses to remain empty, and then there will be nothing to *disfrain*.

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against
TOVEY.

See the case of
Lekeux v. Nash,
2. Sura. 1221.

As to THE LAST OBJECTION, That by the indorsement the payment of the wine is no rent, but a reservation, &c. it is not material whether it is a reservation or not; for it is a duty, and it arises by reason of the thing demised, and goes along with it; and as to this purpose, it is like the case where two copartners made partition, and one covenanted to acquit the other of a suit occasioned by the land so divided; the covenantee aliened; and it is the opinion of my LORD COKE (a), that the alienee, who is a stranger to the covenant, shall maintain an action against the covenantor, because the acquittal runs with the land. * It must be admitted, that in the case of *Overton v. Sydall* (b) there is a judgment seemingly in point against the now plaintiff, that the action does not lie against an executor of a lessee for years, after such executor has assigned the term, because there is neither privity of contract or estate remaining in him to support the action. But this has been denied to be law (c), because such executor shall be still liable to the contracts of his testator, so long as he has any assets to satisfy them.

* [76]

After two arguments, JUDGMENT was given in *Easter Term* following, for the defendant in the original action, and the judgment in the common pleas reversed. IT WAS HELD, that the assignee was chargeable by reason of the land, and when he had parted with his interest, there could be no reason given why he should be any longer liable, especially since the executor of the lessee is still bound to perform the covenants in the lease so long as she has assets, and that was the true reason of the judgment in the case of *Hellier v. Casebard*, as has been observed. That of *Kighley v. Bulkley* upon the point of notice, &c. was not adjudged upon much debate; and therefore a writ of error was afterwards brought upon it in the exchequer chamber; and my LORD HALE, who was then Chief Baron, and BRIDGMAN, Chief Justice, were of the same opinion with TWISDEN, Justice, that notice was not necessary (d).

(a) Co. Lit. 385. a.

(b) Cro. Eliz.

(c) In the case of *Hellier v. Casebard*, 1. Sid. 266.

(d) See the pleadings in this case, 2. Vent. 228. to 234.; the opinions of the Judges in the court of common pleas, 3. Lev. 295.; the second argument, 1. Show. 340.; and the opinion of the court of king's bench, Carth. 177. 12. Mod. 23. 1. Saik. 81.; but all the Reports agree, that the judgment was reversed, for that

notice was not necessary, 3. Com. Dig. "Covenant" (C. 3.). See also *St. Saviour's v. Smith*, 3. Burr. 1271. S. C. 1. Bl. Rep. 351. *Philpot v. Hoare*, Ambler, 480. *Holford v. Hatch*, Dougl. 181. 187. *notis*. *Eaton v. Jaques*, Dougl. 454. *Walker v. Reeves*, Dougl. 461. *notis*. *Lekeux v. Nash*, Stra. 1221. *Fonblanque's Treatise of Equity*, 350. *notis*. *Cheney v. Batten*, Cowp. 243. *Den v. Harrison*, 1. Term Rep. 431.

Hilary Term, 3. William & Mary, In B. R.

Cafe 29.

Parker against Harris.

Trinity Term, 3. Will. & Mary. Roll 27.

In debt for rent on two demises, one for seven years, the other at will, it is sufficient for the plaintiff to declare that he was possessed of the premises, without shewing what estate he had.

* [77]

S. C. 2. Vent. 249. 253. 270.
S. C. Skin. 307.
S. C. Holt, 411.
10. Mod. 331.
11. Mod. 145.
219. 258.
12. Mod. 1903.
319. 540.
Ld. Ray. 746.
902. 923. 1154.
1551.
Stra. 817.
Com. Rep. 391.

ERROR of a judgment in the common pleas in an action of debt for rent, wherein the plaintiff *Harris* declared upon two demises, viz. of one messuage, being in *et super acclivitatem de HAMPSTEAD HILL, Anglice* the rise of *Hampstead Hill*, **HABENDUM** for seven years, paying eighteen pounds a year, &c. and upon another demise at will, paying after the rate of eighteen pounds a-year, during the continuance of that demise.

* The defendant pleaded in bar, that *tempore dimission. prædictarum*, the plaintiff *nil habuit in tenementis, &c.*

The plaintiff replied, that before the demises made by him to the defendant, the *Lord Wotton* demised to the plaintiff a piece of land, with an old house and barn, being parcel of the premises, for forty years; the said *Lord Wotton* *adunc et ibidem plenam potestatem jus et titulum habent.* so to demise it, &c. by virtue whereof the plaintiff was possessed, and made a lease to the defendant, *modo et formâ, &c.*

To this replication the defendant demurred (a).

AN EXCEPTION was taken to it, that the plaintiff ought to set forth what estate the *Lord Wotton* had when he leased to the plaintiff, and that *plenam potestatem jus et titulum* was not sufficient, without shewing what estate he had; and this seemed, in the court of common pleas, to be a good exception, it being upon a demurrer (b).

In debt for rent on two demises, one for years, the other at will, the defendant must plead distinctly to each demise.

Then **IT WAS OBJECTED** against the plea, that the defendant had set forth, that *tempore dimission.* the plaintiff *nil habuit in tenementis*; it should have been *temporibus*, because the plaintiff had declared upon two demises, and he might have a title when one was let, though not when the other was demised; and this seemed to be a good exception to the bar, for that the defendant ought to have pleaded distinctly to each demise (c).

A declaration in debt for rent on a demise of a house "in and upon the rise of *Hampstead* bill," is good; and the venue shall come from *Hampstead*; for the rise shall be intended "de vicinato de *HAMPSTEAD.*"

But then **AN EXCEPTION** was taken to the declaration, that there was no place laid for the premises demised; for *in et super acclivitatem, &c.* is only a description of the situation.

And of this opinion was **THE CHIEF JUSTICE.**

But **THE OTHER THREE JUDGES** held, that the venue should come out of *Hampstead*, which shall be taken for the vill, and that as well as if it had been said *apud acclivitatem*; and so judgment was given for the plaintiff.

AND NOW IT WAS ARGUED, in the court of king's bench, that if *Hampstead* be presumed to be a vill, it is but part of it;

S. C. Carth. 234.

17. Aff. pl. 30. 6. Hen. 7. pl. 3. 9. Edw. 4. pl. 9.

(a) See the pleadings, 2. Vent. 249. (c) See S. C. 2. Vent. 271.

(b) See S. C. 2. Vent. 271.

and

Hilary Term, 3. William & Mary, In B. R.

and for that reason the *venue* is ill, for it is not good *de ballivâ*, because it is uncertain in the limits. If it be intended to be *lieu conus*, then it is naught, if alledged to be out of the vill or parish; and for that reason a *venire facias de LINCOLN'S INN*, has been adjudged not good.

PARKER
against
HARRIS.

* Then as to the objection, that there could not be a *venue* from the place where the land lies, it being *in et super acclivitatem de HAMPSTEAD-HILL*; it was answered, that this must necessarily be intended to be a vill, hamlet, or *lieu conus*; if neither, then it may be a *lieu conus* out of a hamlet, which the defendant ought to have pleaded in abatement. But the *venue* must come from *Hampstead*, because it is said *in et super acclivitatem de HAMPSTEAD*: now *in* and *apud* are of the same signification; and it is admitted, that if it had been *apud acclivitatem*, &c. it had been good (a).

* [78]

THEN the second count is upon a lease at will, rendering *secundum ratam*, which is not a good reservation, because it may be in corn, or in any thing satisfactory: besides, an action may be brought every day or every hour, there being no time limited when the rent shall be; it might have been good upon a contract for goods, because the jury may judge of the value, but not for rent.

A lease for years
reserving rent
after the rate of
18l. a-year is
void for uncer-
tainty.

S. C. 1. Salk,
262.

Ld. Ray. 77. 82. 370. 746.

And as to the replication, the same objection was made as in the common pleas, that the plaintiff ought to have shewed what title my Lord Wotton had at the time of the demise, that the Court might judge whether he had a power or not to lease: and for this there is a judgment in point, in *Glass's Case* (b); where the replication was, that the plaintiff *habuit bonum et sufficientium*, &c. and it was adjudged upon a writ of error after verdict, that the estate ought to be set forth: but the plaintiff had judgment, because aided by the statute of *Jeofails*, it being after verdict.

E contra. The replication is good in substance, for when the plaintiff intends to avoid the bar, he needs not plead it so sufficiently as if he had been to shew his own title, like the case of *Lodge v. Fry* (c), where the plaintiff in bar to the avowry shewed that the land was copyhold, grantable in possession or reversion for life or in fee, and that the lord granted the reversion to him after the death of *W.* who was tenant for life in possession; and upon a demurrer, because the plaintiff had not shewed the beginning, or by whom *W.* had the estate, yet judgment was given for the plaintiff, because this was but only a conveyance to his title, and not the title itself (d).

8. Mod. 343.
10. Mod. 205.
257. 297.
Stra. 871. 1220.

(a) See the Year Books 6. Hen. 7. pl. 3. 9. Edw. 4. pl. 9.; the Book of Assizes, 17. Aff. pl. 30. 12. Mod. 49. Ld. Ray. 105. 172. 255. 344.—AND NOTE, It is said in S. C. Carth. 235. that the judgment was reversed on this

objection; for *super acclivitatem*, &c. is not sufficient *venue*. S. C. 2. Vent. 272. S. C. post. 80.

(b) Cro. Jac. 312. Yelv. 227.

(c) Cro. Jac. 52.

(d) Cro. Car. 133.

PARKER
against
HARRIS.

Ld. Ray. 819.
1160.

* LASTLY, The payment *secundum ratam* must be in money, and can be intended in no other thing, because it is in the case of a tenancy at will. The reservation would have been good if it had been in an *assumpsit* or covenant; it amounts to no more than a contract between the parties. In the case of *Titus v. Perkins* (a) a custom was set forth to pay a fine, *tantam denariorum summam quantum terræ valebant per annum tempore admissionis*; and it was adjudged good, because it might be helped by an averment that the land was worth so much that year. So in evidence to a jury upon the custom of a manor (b), that the land was demisable, paying the treble value of the rent, for twenty-one years, and if the termor died within the term, that his heir should have it, paying one year's rent as a fine certain, and if he assigned it, then the assignee was to pay one year's value of the rent; this seemed to be an uncertain custom throughout, yet it was held good. Services are of the same nature with things which are *in render*, and those may be certain in an uncertainty (c); for a man may hold of his lord to shear all his sheep depasturing within the manor, which at first is very uncertain, because he may have more or less; but because it is referred to a certain manor, therefore it is held that the lord may distrain for such a service, which he could not do if it was not certain. In this case the payment *secundum ratam*, &c., is no part of the thing demised, but something out of it, which may be reduced to a certainty when judgment is given by the Court for the damages sustained by the detainer of the rent.

CURIA. The reservation *ad ratam* is not good, it being upon a lease at will, where the time of payment of the rent should be very certain; for if the tenant hold over a day, he must pay the rent of the next quarter.

Ld. Ray. 707.
751.

But DOLBEN, *Justice*, inclined, that it being uncertain how long the tenant would continue in possession, he being only tenant at will, this reservation may be good.

As to the other objections, IT WAS HELD not to be material for the plaintiff in his replication to shew his title, or what estate he had in the houses, upon the reasons and authorities alledged at the bar.

Sid. 326.

* And likewise THE COURT concurred in opinion with the Judges of the common pleas upon the place from whence the *venue* should arise, which must be from *Hampstead*; for if it had been *de vicineto HAMPSTEAD*, then there could be no objection to it.

But because the reservation was held to be void, the judgment in the common pleas was reversed in *Michaelmas Term* following.

(a) 3. Mod. 132.
(b) Cro. Jac. 671.

(c) Co. Lit. 96.

COVENANT.—The plaintiff declared, that the manor of *Hackney*, in the county of *Middlesex*, is an ancient manor, whereof one messuage with the appurtenances, in *Meer-street*, is copyhold of inheritance; that there is a custom within the said manor for every customary tenant thereof, being seised in fee of any copyhold lands or tenements, to demise the same for thirty-one years more or less, without licence, &c.; that on the thirty-first day of *December*, in the nineteenth year of *Charles the Second*, *Sir William Bolton*, being then lord of the said manor, did grant the said messuage, &c. to *George Hockenball* and *Mary* his wife, and to the heirs of the said *George*, who was thereupon admitted; that on the twentieth day of *February* 1671, the said *Hockenball* and his wife, by their indenture, did demise the said messuage to the defendant for twenty-one years rendering rent, in which lease the defendant covenanted to repair during the term; that by virtue of the said demise, the defendant entered and was possessed, &c.; that *Mary Hockenball* died, and afterwards, viz. on the twentieth day of *January* 1684, the said *George Hockenball* granted the reversion of the said messuage, &c. to his son *George Hockenball* the younger, and to his heirs; that afterwards, viz. on the fourteenth day of *August*, in the first year of *James the Second*, the said *George Hockenball* the son was admitted tenant, and the same day surrendered the premises to the plaintiff *Glover*, who was admitted, and who now brought this action against the defendant for not repairing of the premises.

* The defendant pleaded, that after the lease made to him, and before the reversion came to the plaintiff, viz. on the twenty-fourth day of *July*, in the twenty-eighth year of *Charles the Second*, he, the said defendant, assigned the messuage, &c. to *Sarah Pikes*, of which the plaintiff had notice, by virtue whereof she entered and was possessed; *et hoc, &c.*

The plaintiff demurred; and the defendant joined in demurrer.

THE CASE, upon the pleadings, is shortly thus:—A copyholder in fee made a lease of a messuage for twenty-one years, warranted by the custom, &c.; the lessee covenanted to repair during the term; afterwards the lessor granted the reversion to his son, who surrendered to the plaintiff, who brought an action of covenant against the lessee for not repairing.

The principal question was, Whether the action would lie or not?

The doubt arose upon the tenure of the messuage, which was copyhold; for if it had been a freehold, the action might have been well brought by the assignee of a reversion against a lessee for years

If a copyholder in fee make a lease for years, warranted by the custom, in which the lessee covenants to repair during the term, a surrender of the assignee of the reversion may maintain covenant for non-repair against the original lessee, although he had assigned the term before the reversion was surrendered to the plaintiff: for a copyholder's within the statute 32. Hen. 8. c. 34.

S. C. 3. Lev. 326.
S. C. 1. Show.
284.
S. C. Carth. 205.
S. C. Holt, 159.

* [81]

S. C. 1. Salk.
185.
S. C. Skin. 226.
305.
S. C. Comb.
115.
Co. Lit. 215.
Ray. 250.
Yelv. 222.
Cro. Jac. 305.
2. Leon. 33.
Doug. 186.
3. Term Rep.
398.

Hilary Term, 3. William & Mary, In B. R.

GLOVER
against
COPE.

years after he had assigned the term, notwithstanding the lessor or his assigns had accepted the rent from the assignee of the lessee, and this upon the general words of the statute of 32. Hen. 8. c. 34. which gives "the grantees and assignees of reversions of lands, tenements, and other hereditaments, the like advantage against lessees by entry for non-payment of rent, as the lessors or grantors themselves might have."

Now, Whether copyhold lands may be comprehended in these general words? was the chief question

8. Mod. 72.
10. Mod. 158.
Ed. Ray. 320.
368. 322. 554.
1551.

FIRST, It was premised, that without the aid of the statute, a grantee of a reversion might bring an action of debt; for so was the law before this statute was made (a); and it was grounded upon this reason, that wherever a man was entitled to a reversion, so that he had the rent which is incident to it, and which is given by law, there the law likewise created the privity, on purpose to maintain an action of debt for the rent.

Then two questions were made :

FIRST, Whether this covenant runs with the reversion? for if so, then the plaintiff, being a grantee of a reversion, may bring this action at the common law.

* [82]

* SECONDLY, If not, then, Whether the assignee of a reversion of a copyhold is aided by the statute of *Henry the Eighth*?

10. Mod. 384.
Comy. 230.
Stra. 230. 400.
763.

As to THE FIRST POINT, this covenant extends to support the thing demised, for it is *to repair*; it is appurtenant to it, and shall run with the land, and will bind an assignee of the term, though he is not obliged by the express covenant; for it is parcel of the demise and contract, and had an existence at the time of the making of the lease; and so is *Spencer's Case* (b). In debt for rent by an assignee of a reversion against the assignee of the term, he pleaded, that the lessor covenanted with him, "that if he should be disturbed in the possession, &c. that then he should detain so much of the rent as he should be forced to pay, &c.;" and he alledged, that so much had been levied upon him for fines and issues, which he with-held out of the rent; and upon a demurrer it was held, that he should have the benefit of this covenant, for it runs with the land, and upon such a covenant the assignee of the term might have detained the rent at the common law. The objection, viz. that if this covenant runs with the land, then *the assignee*, and not *the lessee*, must be chargeable, is of no manner of force; because the lessee is bound, by express covenant, to repair, and no assignment of the term, or acceptance of the rent by the lessor, can discharge him. This is the express resolution in several cases (c); and if it should be objected, that in those cases the actions were brought by the lessors themselves, and not by the grantees

(a) The Year Books 5. Hen. 7. pl. 19.
9. Hen. 6. pl. 16.

(b) 5. Co. 16. Cro. Car. 137.
Co. Lit. 215.

(c) Cro. Car. 188. 380.

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of the reversion, then the judgment of the Court in the case of *Brett v. Cumberland* (a) will be a direct answer to that objection, which was shortly thus: The lessee, having covenanted to repair, assigned his term; the grantee of the reversion in fee accepted the rent of the assignee; the lessee died, leaving the defendant his executor; and the said grantee brought an action of covenant against the executor of the lessee for not repairing after the assignments both of the reversion and the term; and it was held, that it would lie upon the statute, being a covenant in fact, and running with the land, and that no assignment made by the first lessee could discharge his executors so long as they had assets. It is true, the action could not be brought against them by reason of any privity of contract, for there was none; but it may be brought upon the covenant itself, so long as they have any of the testator's estate in their hands. * And therefore if the plaintiff in this case should not be entitled to this action at the common law, yet he is aided by the statute, notwithstanding he comes to his estate by *surrender*, because a *surrenderer* is an *assignee* within the equity and meaning of the statute, in order to maintain either an action of debt or covenant. It has been formerly held, that a *surrenderer* of a copyholder in fee, is not such an assignee as is intended by this statute, in order to take advantage of a condition broken, because he is in by the custom and not by law, and cannot be privy to the lease made by the surrenderor; and so is the case of *Beal v. Brasier* (b). But this was a judgment without argument, and only by two Judges, the rest being absent, so that it is not of that force as a judgment given by the whole Court upon a solemn debate. It has been held (c) also, that copyhold estates are not within the statute *de Donis, &c.* and yet they do entail those estates notwithstanding that judgment. It cannot be denied but that such estates were valuable in the law long before the making of the statute of 32. Hen. 8. c. 34. for JUSTICE LITTLETON tells us (d) the opinion of two Chief Justices, in the reign of *Edward the Fourth*, was, that if such tenants pay their services, and are turned out of the land, they may have actions of trespass against the lord; nay they may prescribe against him, by reason that they have fixed and perdurable estates. Now this statute was made for a general remedy to give actions to recover men's right (e), and therefore copyholds must be included, because they are not only valuable in the law, but are a great part of the tenure of the nation. And as they have been valued before, so likewise they have been since the making of the statute; for if a copyholder for life make a lease for three years generally, having licence to make it for three years, if he so long live, though the licence is not pursued, yet the lessee may maintain an ejectment (f). So where (g) lessee for years is *dominus pro tempore* of a manor, and takes a surrender, and his

Glover
against
Cory.

8. Mod. 72.
10. Mod. 12.
235.
12. Mod. 45.
166. 171. 371.
384.
Comy. 627.

* [83]

1. Vern. 87.
Ld. Ray. 320.
630. 726.

Gillb. E.R. 109.
188.
Stra. 1197.
3. Peer Wms.
9. 155.
11. Mod. 18.
53. 68. 199.
12. Mod. 147.
301. 378.
1. Peer. Wms.
330.
Prec. Ch. 568,
Comy. 71.
Ld. Ray. 552.
Stra. 447. 452.

Ld. Ray. 132.
996. 1000. 1145.
1231.

Comy. 84.
Ld. Ray. 76.
159. 658.

(a) Cro. Jac. 522.

(b) Cro. Jac. 305. Yelv. 222.

(c) Cro. Car. 44.

(d) Litt. Sect. 77.

(e) Keilw. 76, 77.

(f) Owen, 72.

(g) Co. Lit. 59.

LOVER
against
COPY.

[84]

estate determines before admittance, yet it shall be compellable to be done according to the surrender. The severance of the inheritance of the copyhold from the manor will not destroy the tenure itself (a), because the estate of the copyholder is established by custom; and therefore * neither the lord, or any claiming under him, can turn out such a tenant. Particular statutes by which the lord may have any prejudice, as to fines or amerciaments (b), do not bind copyhold tenants. As the statute of 34. & 35. Hen. 8. c. 34. concerning bankrupts, did not extend to copyholds, and therefore a subsequent law 13. Eliz. c. 7. was made to include them; neither did the statute of recusancy extend to such estates; and the reason given is (c), because the lord may thereby receive an injury by the loss of his customs and services. But general laws made for the public good, and where the lords of manors can have no prejudice, are binding, and shall extend to copyhold lands, though they are not named in such statutes. As in *Heydon's Case* (d), a religious house granted a copyhold for two lives, and in the thirtieth year of *Henry the Eighth* demised the same to *Heydon* for eighty years; the very next year a statute was made (e) by which it was enacted, "that if any religious house shall, within one year next before the first day of that parliament, or afterwards, lease or grant, &c. any lands in which any interest or estate for life or years was then in being, that such lease should be void." Now the grant of this copyhold for two lives, in the year before the statute was made, was adjudged an interest, and within the general words of the act, and therefore the lease to *Heydon* was void (f). By the statute of Limitations, 32. Hen. 8. c. 2. it is enacted, "that a writ of right shall not be maintained to any lands, &c. or any farther time than for sixty years next before the date of such writ," which words point only at an interest at common law, and not by any custom; and yet copyhold lands have been adjudged to be within that act (g). So likewise by the statute of Maintenance, 32. Hen. 8. c. 9. "the buying any pretended right of title to any manors, lands, or tenements, is prohibited;" which words have been adjudged to extend to a pretended right to a copyhold estate (h), because the statute was made for avoiding maintenance in general, which design would be lost if copyholders lands, which are a considerable part of the kingdom, should be left out. Now to enforce this argument it is to be observed, that the two statutes last mentioned were made in the same year, and by the same parliament by which this statute * was made to enable grantees of reversions of "manors, lands, tenements, and other hereditaments," to take advantage against lessees; and if such constructions have been made upon the general words of these statutes, what reason can be given why the like should not be made in this case?

[85]

(a) 4. Co. 24.

(b) 34. Hen. 8. c. 14. 13. Eliz. c. 7.

(c) Owen, 37.

(d) 3. Co. 7.

(e) 32. Hen. 8. c. 13. f. 7.

(f) 9. Co. 104.

(g) Moor. 411.

(h) 4. Co. 26. See 1. Hawk. P. C. ch. 36. f. 12.

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MR. ROE, *à contra*, argued, that the authorities cited for the plaintiff are not applicable to the case in question.

GLOVER
against
CORE.

AND FIRST, as to those cited out of THE YEAR BOOKS, they are actions of debt for rent, and are of a different nature from those in covenant, which is a collateral thing, and a *chose in action*, and will not follow the reversion without the help of the statute. So that if any thing supports this action of covenant it must be the statute, but it is not within the general words or within the meaning of that law. Nothing of copyhold can be intended to fall under the general words, *viz.* "manors, lands, tenements, and other hereditaments;" for such are only known at the common law, and therefore can have no reference to copyhold lands, which are created by custom, and are only estates at the will of the lord. This has been held to be the sense and meaning of those very words in the several statutes of Jointures, Uses, and Partition. So likewise upon the statute of 11. Hen. 7. c. 20. which makes the alienation of any estate of the wife void, which she has in dower, for life, or in tail, jointly with her husband, &c. in any "manors, lands, tenements, or other hereditaments;" the alienation of a copyhold estate, which she had in tail jointly with her husband, was adjudged good, and not within that statute (a). Upon the statute of 13. Eliz. c. 7. which empowers the commissioners of bankrupts to sell their lands, &c. it has been held they could not sell copyholds, if that law had not given them power by express words, *viz.* to sell as well copy as free land (b). So are several acts of parliament which are made to give forfeitures of "lands, tenements, or other hereditaments, &c." which words do not extend to copyholds, but only to inheritances at common law. And the reason is, because copyhold lands at the time of making this and other acts, and long after, were in no esteem of the law; for the tenants of those lands held them in *villenage*, or at best were but tenants at will, and so not within the provision or care of acts of parliament. * And even at this day their estates are held only at the will of the lord, according to the custom of the manor: and in many respects this tenant has a dependance upon the lord; for he can neither alien nor lease his copyhold without licence; and therefore when either is done, it is as well the act of the lord as of the tenant.

27. Hen. 8. c. 10.

31. Hen. 8. c. 11.

32. Hen. 8. c. 32.

[86]

ANOTHER REASON offered why this action would not lie was, because the lessee had not *attorned* to him in the reversion, according to the opinion of my LORD HOBART, in *Swinnerton's Case* (c), where a copyholder made a lease for years rendering rent, and then he surrendered the reversion to the defendant, who was admitted; and in a replevin he avowed for rent-arrear, which, it was said, he could not do, or enter for a condition broken, without the attornment (d) of the lessee to him. But this was not much insisted

2. Bl. Com. 290.

(a) *Harrington v. Smith* 1. Sid. 41.

73. Ant. 45.

(b) *Cro. Car.* 24. 1. *Leon*, 98.

(c) *Hob.* 1: 7.

(d) See 4. & 5. *Ann.* c. 16. and

11. *Geo.* 2. c. 19. by which attornments are rendered unnecessary.

Hilary Term, 3. William & Mary, In B. R.

GLOVER
against
CORE.

on, because the law seems to be otherwise; for the estate of a copyholder does not pass by any grant of the reversion at the common law, to which an attornment is necessary, but by surrender and admittance.

CURIA. A copyholder has an inheritance, though he has it in *the post*, and his estate is now fixed and established by the custom; and therefore it is reason to construe him to be within the equity of this statute, and the rather because of late he has been held to be within the statute *de Donis, &c.*

And so without farther argument judgment was given for the plaintiff.

Cafe 31.

Walwin against Smith.

Trinity Term, 3. Will. & Mary, Roll 361.

Discontinuance in process or in pleading, is aided by the 32. Hen. 8. c. 30. as well in inferior as in superior courts.

S. C. 1. Salk. 117.
S. C. Cart. 206.
S. C. Holt, 155.
1. Show. 319.

* [87]
10. Mod. 87.
325.
12. Mod. 8.
307. 421. 578.
626.
Ld. Ray. 15. 17.
716. 872. 894.
1121.
Stra. 139. 734.
947.
10. Mod. 147.
325.
Ld. Ray. 598.
850. 1047. 1221.
1308. 1371.
Doug. 115.

A QUESTION was moved, Whether a *discontinuance* in an inferior court is helped, after judgment, by the statute of *Jeofails*?

And THE COURT was of opinion, that *discontinuance* of process or in *pleading* was helped by the statute; but where *the cause* is discontinued and out of court, as in the beginning of this reign for not holding *Hilary Term* all causes were then discontinued, which could not be aided by any statute of *Jeofails*, without a particular act of parliament for reviving those causes and process. In *Beecher's Case* (a) after a verdict for the plaintiff, there being some doubt whether the *visne* was good or not, and the plaintiff * intending to bring a new action, got leave to discontinue, in which case the judgment should have been entered, "*quod querens nil capiat per breve suum, sed sit in misericordia pro falso clamore suo; et præd. defendens eat inde sine die* (b); but instead of such an entry it was, that the plaintiff by his attorney "*venit hic in curia et fatetur se in curia hic ulterius nolle prosequi; ideo consideratum est quod defendens eat inde sine die*;" and held that it amounts to a *retraxit*, and is a bar to the same action for ever, so long as that judgment stands in force. Whereupon a writ of error was brought, and it was shewed that there was a *discontinuance*; for the verdict was 2. *Jacobi*, and the judgment was 4. *Jacobi*; and no *continuance* from one Term to the other, which might have been aided by the statute of *Jeofails*, if the judgment had been given upon *the verdict*; but it was upon *the retraxit*, which is not within the statute (c): and for this reason that judgment was reversed (d).

(a) *Beecher v. Shirley*, 2. Co. 58. Cro. Jac. 211.

(b) So is the entry after verdict upon a *demurrer*; but if upon a *non-suit*, then it is "*in misericordia quia non prosecutus est breve suum*." NOTE to former Edition. And see Cro. Jac. 213.

(c) 32. Hen. 8. c. 30. But see 4. & 5. Ann. c. 16.

(d) But now by 5. Geo. 1. c. 13. after verdict in any court of *England* or *Wales*, judgment shall not be stayed or reversed for any default of form or substance in any bill, writ, original or judicial, or variance from the declaration or other proceedings.

EASTER

E A S T E R T E R M,

The Fourth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

* Adams *against* Tapling.

* [88]

Cafe 32.

COVENANT. The breaches assigned were, that the houses were not in repair; that the locks were taken away; and that the hedges were broken down, and the ditches uncoursed. The defendant pleads an agreement made between the plaintiff and him, that he should employ a workman three or four days in and about the repairing of the house, which should be a sufficient *satisfaction*, and that he had employed a workman, &c. Upon this plea they were at issue, and there was a verdict for the defendant.

In covenant, on a breach that the house was not in repair, a *PLEA* that the plaintiff agreed that the defendant should employ a person four days in and about repairing the house, in *satisfaction*, is bad; for the defendant was obliged to do the repairs by the original covenant.

It was now moved in arrest of judgment; and the exceptions taken were,

FIRST, Where an "accord and satisfaction" is pleaded, it must be real; but in this case it was no more than the defendant was obliged to do.

SECONDLY, There are several breaches assigned, and the defendant has only answered to the repairs of the house, and

128. Dyer, 356. Yelv. 125. Stra. 426. *Ld. Ray.* 122. 566. 1072. 10. Mod. 224. 306, 8. Mod. 242. 236. 345. 1. Peer. Wms. 308. Stra. 426. 575. 615. 1194.

Post. 250.

1. Roll. Abr.

Easter Term, 4. William & Mary, In B. R.

ADAMS
against
TAPLING.

so it is a *discontinuance* in pleading, which is not aided by a verdict.

THIRDLY, The satisfaction is uncertain, *viz.* to employ a man to work three or four days.

And for these reasons judgment was stayed.

* [89]

1. Leon. 19.
Cro. Eliz. 193.
Co. Lit. 212.
1. Com. Dig.
"Accord"
(B. 2.).

* CURIA. In covenant, where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there "accord and satisfaction" is a good plea. But in an action of debt upon a bond, where the sum to be paid is certain, there a lesser sum cannot be paid in satisfaction of a greater.

Cafe 33.

Bridges against Saer.

A prescription to have common for sheep is supported by a finding that it was for sheep, and also for cows.

TRESPASS for impounding of his sheep: The defendant justified the taking and impounding for *damage feasant*. The plaintiff in his replication prescribed to have a common for sheep. And the prescription being traversed, the jury found that the plaintiff had common for sheep, and also for cows.

An objection was made, that this *verdict* did not maintain this *prescription*, because it was larger than it was pleaded.

S. C. 1. Show.
347.
S. C. Carth.
219.

But IT WAS ADJUDGED for the plaintiff.

S. C. 12. Mod. 25. Hob. 53. 10. Mod. 300. Ld. Ray. 865. Comp. 766. Buller's Nisi Prius, 59. 1. Burn, 440. Espinass. Digest, 362.

Cafe 34.

Carter against Horner.

Hilary Term, 2. Will. & Mary, Roll 324.

If a testator seised of freehold and copyhold lands devise "all the rest, residue, and remainder, of his estate to his wife and children, equally to be divided among them;" the word *estate* signifies the interest he had in the land, and passes a fee.

AN ACTION ON THE CASE was brought on a *wager*, wherein the plaintiff declared, that there was a discourse between him and the defendant concerning a messuage in *Cookham*, whereof *Edward Darling* was seised *in fee*, and likewise concerning a will which the defendant affirmed to be published by the said *Edward Darling*, by which he devised his estate (having a wife and four children) in these words, "ALL AND SINGULAR the rest, residue, and remainder, of my estate, of what kind, nature, or quality soever, whether freehold or copyhold, which I intend to surrender to the use of my will, leases, goods, plate, debts, and chattels, I give and devise to *Elizabeth Darling* my wife, and to *George, Edward, Elizabeth*, and *Mary Darling*, in such manner and form as hereinafter is mentioned, that is to say, one third part to my wife, the other two thirds to my said children, equally to be divided, share and share alike." The testator further de-

S. C. 1. Eq. Abr. 177. S. C. 1. Show. 348. Cro. Car. 447. Stile, 281. 2. Lev. 91. 1. Mod. 100. 2. Chan. Caf. 262. 1. Salk. 236. 3. Mod. 45. 8. Mod. 255. 10. Mod. 94. 287. 525. 11. Mod. 90. 102. 207. Cases T. T. 110. 157. 1. Vern. 340. Prec. Ch. 37. 264. 471. Gilb. E. R. 77. 87. 2. Peer. Wms. 523. 3. Peer. Wms. 193. 295. 386. Comyns, 337. 3. Com. Dig. 425. 2. Bac. Abr. 59.

vised,

Easter Term, 4. William and Mary, In B. R.:

vised, that the share of *George* should be kept entire till he was of full age, "and if any happen to die before twenty-one, then to the survivor, and equally to be divided;" *Edward* died; *Elizabeth* survived; and *George* died before twenty-one.

CARTER
against
HORNAR.

* The question was, Whether *Elizabeth* the mother had an estate for life, or in fee, by virtue of this will?

* [90]

It was said, she had an estate *in fee* upon this difference, *viz.* if the testator had been entitled to lands in fee, and likewise to mortgaged lands not forfeited, and had devised his lands in fee to his brother, "and all the rest of his leases, mortgages, and estates, debts and duties, &c. of which he was *possessed, &c.*" there the word "estate," being put amongst chattels, shall only carry an estate for life, and the rather because of the word "*possessed (a).*" But where the word "estate" stands by itself, and is not mingled amongst personal things; as, for instance, where a man being seized in fee devised his "whole estate," there the word "estate" extends to the land, and the devisee shall take it in fee (*b*); for it is a word which comprehends not only the land itself, but all the interest the testator had in it.

E contra. The word "estate" signifies the *land*, and not the *interest* which the testator had in it; and being in a will, that word must be construed according to the common and known acceptation of it, which imports *the land* itself, and not *the estate* which he had in the land; and therefore an estate for life only passes. The words which follow, *viz.* "of what nature, kind, or quality soever," are a further description of the thing devised, which is the land, and of what tenure it may be; so that the testator has not left it to the general construction what shall pass by the word "estate" alone. Thus it is in a grant: as if a lease be made to *A.* remainder to *B.* in tail, remainder to the right heirs of *B.* who bargains and sells all his *estate* to *D.* nothing passes to him but during the life of the grantor whilst the estate tail is in being (*c*). It is true, by a devise of the "whole estate" it has been held that a fee passes, but it was upon a different reason from the case at bar, for it was devised "paying debts and legacies;" and it happened that the personal estate was not sufficient to do either.

Adjournatur (d).

(a) *Wilkinson v. Maryland*, Cro. Car. 447. 1. Roll. Abr. 834.

(b) *Stiles*, 282. 1. Mod. 100.

(c) 3. Leon. pl. 88.

(d) It is said, S. C. 2. Eq. Abr. 177. IT WAS HELD, that the word "*estate*" must signify the interest the testator had in the land, and so pass a fee.—See

Hogan v. Jackson, Cowp. 299.; *Love- acres v. Blight*, Cowp. 352.; *Den v. Gaskin*, Cowp. 660.; *Right v. Sidebottom*, Doug. 763.; *Cowper v. Martin*, 1. Term Rep. 411.; *Fletcher v. Smjton*, 2. Term Rep. 656.; *Burket v. Chapman*, H. Bl. Rep. 223. *Dally v. King*, H. Bl. Rep. 2.

Declaration in
Ejectment; and
a special verdict.

1. Show. 368. "WARWICKSHIRE, BE IT REMEMBERED, that on *Friday*
" *to wit.* " next after the morrow of the *Holy*
" *Trinity*, in this same Term, before the lord the king and lady
the queen, at *Westminster*, came *Thomas Burton*, by *William*
Blencow his attorney, and brought here into the court of the
said lord the king and lady the queen then there, his certain
bill against *Robert Woodward*, clerk, in custody of the marshal,
&c. of a plea of TRESPASS and EJECTMENT; and there are
pledges of prosecuting, to wit, *John Doe* and *Richard Roe*;
which said bill follows in these words: "WARWICKSHIRE
to wit; *Thomas Burton* complains of *Robert Woodward*, clerk,
in custody of the marshal of the Marshalsea of the lord the king
and lady the queen, being before the king and queen themselves,
for that, TO WIT, that whereas one *Edmund Budd*, clerk, on the
thirteenth day of *March*, in the third year of the reign of the
lord *William* the now king, and the lady *Mary* the now queen
of *England*, &c. at *Burton Dasset*, in the county aforesaid,
demised, granted, and to farm let, to the aforesaid *Thomas*, one
messuage, with the appurtenances, situate, lying, and being, in
Burton Dasset aforesaid, in the county aforesaid, to have and to
hold the messuage aforesaid, with the appurtenances aforesaid,
to him the said *Thomas* and his assigns, from the Feast-day of
St. Michael the Archangel then last past unto the full end and
term of five years from thence next following, and fully to be
complete and ended; by virtue of which said demise the said
Thomas entered into the tenements aforesaid, with the appurte-
nances, and was possessed thereof until the aforesaid *Robert*
afterwards, to wit, on the same thirteenth day of *March*, in the
third year aforesaid, at *Burton Dasset* aforesaid, in the county
aforesaid, with force and arms, &c. into the messuage aforesaid,
with the appurtenances, in and upon the possession of him the
said *Thomas*, entered thereupon, and him the said *Thomas*
from his farm aforesaid, his said term thereof not being ended,
ejected, expelled, and removed, and him the said *Thomas*
from his possession aforesaid thereof kept out, and yet keeps out,
and other wrongs to the said *Thomas* then and there did, against
the peace of the said lord the now king and lady the now queen;
and to the damage of him the said *Thomas* of ten pounds; and
thereupon he brings suit, &c.

Not guilty
plead.d.

" And the said *Robert*, by *Charles Ballet* his attorney, comes
and defends the force and injury where, &c. and says, that he is
NOT GUILTY thereof; and of this he puts himself upon the
country; and the said *Thomas* likewise, &c.: therefore let
a jury come before the lord the king and the lady the queen at
Westminster, on *Thursday* next after three weeks of the *Holy*
Trinity, and who neither, &c. to take cognizance, &c. because
as well, &c. the same day is given to the party aforesaid there,
&c. Afterwards the process thereupon is continued between
"the

Easter Term, 4. William & Mary, In B. R.

BURTON
against
WOODWARD.

“ the parties of the plea aforesaid, by the jury being thereupon
 “ respited between them before the lord the king and lady the
 “ queen at *Westminster* until *Friday* next after three weeks of
 “ *St. Michael* from thence next following, unless the justices of
 “ the lord the king and lady the queen assigned to take the assizes
 “ in the county aforesaid shall first come. on *Monday* the tenth
 “ day of *August* at *Warwick* in the county aforesaid, by force
 “ of the statute, &c. for want of jurors, &c. : at which day,
 “ before the lord the king and lady the queen at *Westminster*,
 “ cometh the said *Thomas* by his said attorney; and the said
 “ justices before whom, &c. have sent here their record had before
 “ them in these words : AFTERWARDS, on the day and at the
 “ place within contained, before *John Powel, Knight*, one of the
 “ justices of the lord the king and lady the queen of the bench,
 “ and *George Dodson, Esq.* to him the said *John Powel* and
 “ *Nicholas Lechmere, Knight*, one of the barons of the exchequer
 “ of the lord the king and lady the queen, justices of the said lord
 “ the king and lady the queen assigned to take the assizes in the
 “ county of *Warwick*, by force of the statute, &c. for this time
 “ associated, the presence of the said *Nicholas Lechmere* not being
 “ expected, by virtue of the writ of the lord the king and lady the
 “ queen of *si non omnes, &c.* come as well the within-named
 “ *Thomas Burton* as the within-written *Robert Woodward* by *Si non omnes*
 “ their attornies within-contained : and the jurors of the jury
 “ whereof mention is within-named being called, some of them,
 “ to wit, *George Warner, Henry Norton, Job Everton, Robert*
 “ *Dodington, Joseph Sherston, Thomas Coles, William Chaplin,*
 “ *Thomas Thompson, George Cotterell, Thomas Gardner,* and
 “ *Elias Wells*, come, and on that the jury are sworn; and because
 “ the rest of the jurors of that jury have not appeared, therefore *Tales de circum-*
 “ others of the bye-standers, by the sheriff of the county aforesaid *stantibus.*
 “ hereto elected at the request of the said *Thomas Burton*, and by
 “ the command of the justices aforesaid, are added anew, whose
 “ names are annexed to the panel within written, according to the
 “ form of the statute in such case made and provided; and the
 “ jurors so added anew, to wit, *Robert Onely*, being likewise
 “ called, comes, who, to say the truth of the within-contained,
 “ together with the jurors aforesaid hereto first impanelled and
 “ sworn, being elected, tried, and sworn, say on their oath, *THE SPECIAL*
 “ that THE RECTORY of *Burton Dasset*, in the county of *Warwick*, *VERDICT.*
 “ within-mentioned, is, and from the time of which the memory
 “ of man is not to the contrary, was impropriate; and that THE
 “ VICARAGE of the church of *Burton Dasset* aforesaid, from all the
 “ time aforesaid, was and is an ecclesiastical benefice and endowed;
 “ and that the messuage, with the appurtenances within-contained,
 “ is, and on the within-written thirteenth day of *March*, in the said
 “ third year, and from all the time aforesaid was, appurtenant to
 “ the vicarage aforesaid, and parcel of the possessions of the same
 “ vicar; whereupon the same vicarage as before-mentioned
 “ endowed, is, and ought to be, enjoyed by the vicars of
 “ the vicarage aforesaid for the time being; and that on the
 “ fourteenth

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BURTON
against
WOODWARD.

“fourteenth day of *February*, in the first year of the reign of the
 “said lord the king and lady the queen, one *Chamberlain Hamersley*, clerk, was vicar of the said vicarage, and continued vicar
 “of the said vicarage, and the said vicarage had, until his deprivation
 “for the cause hereafter specified, to wit, until the vicarage
 “aforesaid became vacant by virtue of a certain statute in the
 “parliament of the lord the king and lady the queen at *Westminster*, in the county of *Middlesex*, in the first year of the reign of
 “the said lord and lady the now king and queen, made and provided, for the abrogating of the oaths of supremacy and allegiance
 “and appointing other oaths; and that the said *Chamberlain Hamersley*, on the said fourteenth day of *February*, and continually
 “afterwards until his said deprivation, was seised of the said
 “messuage, with the appurtenances, as in his demesnes as of fee,
 “in right of the said vicarage, until the said *Chamberlain Hamersley*,
 “after the making of the statute aforesaid, and before the first day
 “of *August* 1689, in the said statute mentioned, either on the said
 “first day of *August*, or at any time afterwards, did not take the
 “oaths by that statute appointed to be taken, by which the said
 “*Chamberlain Hamersley*, by force of the said statute, of the said
 “vicarage was *ipso facto* deprived, and the said vicarage thereby
 “in law became vacant; and that the within-written *Edward Budd*, clerk, then being a priest according to the laws and statutes of the kingdom of *England* duly ordained, after the end of
 “six months, according to the computation of twenty-eight days
 “to each month, after the said first day of *August* then next following,
 “and before the end of six months computed by the calendar from the said first day of *August* then next following, namely,
 “on the twenty-ninth day of *January* in the first year aforesaid,
 “to the said vicarage was presented, instituted, and inducted, and
 “all things which by the laws and statutes of *England* were
 “requisite or necessary to make him complete incumbent of the
 “said vicarage (if the said vicarage at the time of the said presentation, institution, and induction, was vacant; that afterwards,
 “to wit, on the said 29 *January*, the said *Edmund Budd* entered
 “into the said messuage, with the appurtenances, and was seised
 “thereof *prout, &c.*; and being so seised, the said *Edmund Budd*,
 “on the said tenth of *March*, in the said third year, demised to the
 “said *Thomas Burton* the said messuage, with the appurtenances,
 “to hold and occupy the said messuage, with the appurtenances,
 “to the said *Thomas* and his assigns, from the within-written
 “Feast of *St. Michael the Archangel* then last past, for and during
 “the within-written term of five years then next following, to be
 “fully completed and ended; and that the said *Thomas Burton*
 “afterwards, to wit, on the said thirteenth day of *March*, in the
 “said third year, entered into the messuage, with the appurtenances
 “aforesaid, and was thereof possessed *prout, &c.* until the said
 “*Robert Woodward*, the same 13th day of *March*, in the third year
 “aforesaid, with force and arms, in the messuage, with the appurtenances aforesaid, upon the possession of the said *Thomas Burton*
 “entered,

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" entered, and him from his farm within-mentioned expelled,
 " as the said *Thomas Burton* herein against him complains.
 " But whether upon the whole matter aforesaid, by the jurors
 " aforesaid, in form aforesaid found, the vicarage aforesaid, at the
 " time of the presentation, institution, and induction aforesaid, was
 " vacant, the jurors aforesaid are wholly ignorant, and thereupon
 " pray the advice and consideration of the Court, &c. And if,
 " upon the whole matter aforesaid, by the jurors aforesaid, in form
 " aforesaid found, it shall appear to the Justices and Court here,
 " that the vicarage aforesaid, at the time aforesaid, of the presenta-
 " tion, institution, and induction aforesaid, was then vacant,
 " then the same jurors upon their oath aforesaid say, that the said
 " *Robert Woodward* is guilty of the trespass and ejectment afore-
 " said, in manner and form as the said *Thomas Burton* within
 " against him thereof complains; and they assess the damages of
 " the said *Thomas*, by reason of the trespass and ejectment afore-
 " said, besides his costs and charges by him about his suit in this
 " behalf expended, to 12d. and for those costs and charges to
 " 53s. and 4d. And if, upon the whole matter aforesaid,
 " by the jurors aforesaid in form aforesaid found, it shall appear
 " to the Justices and Court here, that the vicarage aforesaid, at
 " the time of the presentation, institution, and induction aforesaid,
 " was not vacant, then the same jurors, upon their oath aforesaid,
 " say, that the aforesaid *Robert Woodward* is not guilty of the
 " trespass and ejectment within-written, in manner and form as
 " the said *Robert* within for himself in pleading hath alledged.
 " And because, &c.

BURTON
 against
 WOODWARD.

* [95]

* Burton against Woodward.

Cafe 35.

UPON A SPECIAL VERDICT in ejectment the case was
 thus :

The vicarage of *Burton Dasset* was a vicarage endowed, to
 which the messuage now in question belonged. On the
 fourteenth day of *February*, in the first year of *King William*, one
Chamberlain Hamersley was vicar thereof, who was deprived for
 not taking of the oaths by the statute 1. *Will. & Mary*, c. 8.
 The lessor of the plaintiff after six lunar months, to be com-
 puted from the first day of *August*, &c. was presented, instituted,
 and inducted to the said vicarage.

Quere, If the
 Statute 1. *Will.*
 & *Mary*, c. 8.
 which requires
 any archbishop,
 bishop, or other
 person having
 ecclesiastical
 dignity, bene-
 fice, or promo-
 tion, to take the
 OATHS by the
 space of six
 months, shall be
 construed to
 mean lunar or
 calendar
 months?

The question was, Whether it was void, or not, at the time of
 such presentation?

This depended upon the construction of a paragraph of the
 statute made for abrogating of the oaths, and taking of new
 ones, by which it is enacted, " That if any archbishop or bishop,
 " or any other person now having any ecclesiastical dignity,
 " benefice, or promotion, shall neglect or refuse to take the oaths,
 " &c. in such manner as is therein directed, before the first day of

S. C. 1. Show.
 368.
 S. C. Comb. 197.
 S. C. Skin. 313.
 Ld. Ray. 480.
 Stra. 445. 652.
 D. ug. 463.

BURTON
against
WOODWARD.

" *August* 1689, every such person and persons so neglecting or
" refusing shall be, and is, and are hereby declared and adjudged
" to be suspended from the execution of his or their office by the
" space of *six months*, to be accounted from the first day of *August*,
" And if the said person, &c. so having neglected or refused, shall
" not, within the said *six months*, take the oaths in such manner,
" court, or place, as they ought to have taken the same before the
" said first day of *August*, then he, &c. shall be *ipso facto* deprived,
" &c." Now if the six months appointed by this act shall be
accounted *calendar months*, then the plaintiff had no title, because
the church was all that time full of *Hamerfley*.

IT WAS ARGUED *for the plaintiff*, that they shall be accounted
lunar months; for in all statutes where the word "month" is used,
the legal computation shall be twenty-eight days. As where an
information was brought for using of an unlawful game *seven*
months, upon the statute of 33. *Hen. 8. c. 9.* it has been held,
that these months shall be accounted by twenty-eight days to each
month (a). So upon the statute 27, *Hen. 8. c. 16.* of Inrollments,
by which it is enacted, "that no freehold or inheritance shall pass
" but by deed in writing, and enrolled within six months after the
" date thereof," there it shall be also accounted twenty-eight
days (b). * In like manner, where a lease is to be held within a
month after *Easter* and *Michaelmas*, that month shall be likewise
accounted twenty-eight days (c).

IT WAS ARGUED *on the other side*, that "months" generally
speaking shall be accounted in the legal construction twenty-eight
days; as where an act of parliament relates to *laymen*, it shall be
construed according to the usual account amongst them, *viz.*
twenty-eight days (d); but where it relates to *ecclesiastical per-*
sons, as in this case, it shall be according to their computation (e).
It is true, the former of these cases usually happens, because there
are more *laymen* than *churchmen*; and for this reason, and upon
this distinction, the authorities cited on the other side are law.
Now here is an act of parliament relating only to *ecclesiastical*
persons, by which act a certain and determinate time is limited
for a thing to be done, the neglect whereof being penal, it shall be
accounted according to their months, and not by twenty-eight
days. As, for instance, in the case of a lapse, upon a *quare impedit*
the six months shall be accounted according to the calendar (f).
So upon the statute 2. & 3. *Edw. 6. c. 13* which gives a con-
sultation, if the suggestion be not proved by two witnesses within
six months next after the prohibition granted (g). And it was

(a) 2 Roll. Abr. 521. Dyer, 218.
Cro. Eliz. 815. 2 Inst. 320.

(b) Cro. Jac. 167. — See Com. Dig.
"Bargain and Sale" (B. 8.).

(c) Cro. Jac. 167.

(d) See 1. Com. Dig. "Ann." (B)
6. Com. Dig. "Temps" (A).

(e) 2. Roll. Abr. 521. Hob. 179.
Lit. 19

(f) Cro. Jac. 166. Yelv. 109.
6. Co. 62. 2. Inst. 320.

(g) Copley v. Collins, Hob. 179.
2. Roll. Abr. 521. Post. 186.

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never adjudged otherwise when the thing related to ecclesiastical persons (a), and very often where it does not concern them, as upon the statute of 13. *Hen. 4. c. 7.* for suppressing riots, which gives the justices authority to enquire of riots within a month after the offenders are departed, &c. which shall be construed according to the *almanack months*, and not by *twenty-eight days* (b). The very penning of this act may be a good inducement to shew that the makers thereof were of this opinion; for there is a time given to all ecclesiastical persons to come in and take the oaths, viz. before the first day of *August*, otherwise to be suspended. This is not so much a punishment as an admonition that they may keep their dignities by a farther compliance with the law: then a day is given which is a day of grace and favour, to which a penalty is annexed in case of not complying; so that they shall have the longest day to conform to the law; and therefore the construction of these words shall be according to the subject-matter: as if I am to pay money on the first day of * *Michaelmas Term*, it shall be paid the first day in full Term, and not on the *esloin-day*, which in legal construction is the first day of the Term.

BURTON
against
WOODWARD.

* [97]

Adjournatur (c).

(a) But see 2. Mod. 58.

(b) *Dyer*, 142. 218. 1. Sid. 186. Cro. Elz 227. 835.

(c) *HOLT, Chief Justice*, and THE COURT, *abjuncte GREGORY, Justice*, was of opinion, that this case, being upon the construction of an act of parliament, differed from those cases which related to ecclesiastical persons, and ought to be construed according to the rules of the common law: they took time to advise, however, and it does not appear that any judgment was ultimately given in the

case. S. C. Skin. 314. S. C. 1. Show. 368. S. C. Con. b. 191. But *Skinner* reports, that they seemed ripe to give their judgment that the *six months* shall be accounted *lunar months*, and not according to the calendar; that they doubted, viz. *DUNSTON* and *EVANS, Justices*, of the case of *Copley v. Collins*, Hob. 179.; that *HOLT, Chief Justice*, said, that this case alone stuck with him; and that, notwithstanding, he inclined *fortius ut supra*. S. C. Skin. 314.

Knight against Symms.

Case 36.

EJECTMENT for five closes called *Furlong*, containing twenty acres of *arable* and *pasture*, to have and to hold the aforesaid closes of land, &c. Upon not guilty pleaded the plaintiff had a verdict.

It was moved in arrest of judgment, for that he ought to demand so many acres certain of *arable* and so many of *pasture*; and upon this very exception a judgment in ejectment was reversed upon a writ of error brought in this court (a): the plaintiff declared of a messuage and forty acres of land, meadow and pasture thereunto belonging, and did not distinguish how much of each. *Savell's*

An ejectment for five closes called *Furlong*, containing twenty acres of *arable* and *pasture*, is bad; for it is uncertain how many acres of *arable* and how many of *pasture*. S. C. 1. Show. 338.

S. C. Salk. 254. S. C. Holt. 263. S. C. Comb. 198. S. C. Carth. 204. Post. 136. 8. Mod. 277. Li. Ray. 191. 277. 1. Show. 364. Cro. Jac. 435. Cro. Car. 471. 3. Lev. 96. Rem. Eject. 28. 2. Bac. Abr. 170. 1. Burr. 137. 629. 5. Burr. 2673. Cowp. 347. 1. Term Rep. 11.

(a) *Martin v. Nichols*, Cro. Car. 573.

KNIGHT
against
SYMMS.

Case (a) is express, that an ejectment will not lie of *a close*, but it must be of a certain number of acres, and the nature of the land must be particularly expressed. It has been held, that though an ejectment would not lie *de uno clauso* generally, because the sheriff cannot tell of what to deliver possession; yet where a name is given to the close without setting out the number of acres, it is well enough; and this was the case of *Jones v. Howell*, in *Cro. Eliz.* 235. But in the same book, and but two years afterwards, it was ruled (*b*) that it would not lie of a third part of a close, though a name was given to it; and the reason there given was, because an ejectment is in nature of a *præcipe*, which must contain a certain number of acres. But that which comes nearer to the case now in question is the case of *Weeks v. Sparrow* (*c*), which was an ejectment of two closes called *Gulwel*, containing three acres of land, and did not shew what each close contained; which was held good, because the quality of the land was mentioned; but Houghton, Justice, was of another opinion in that case, which seems to be very reasonable; for if an ejectment will not lie *de uno clauso*, because of incertainty, the addition of these words which follow, viz. "containing three acres of land," does not make it more certain. An ejectment "*de castro, villa, et terris*, in *Kilborough*," seems to be certain enough to describe the thing demanded, in order to recover the possession; but it was held to be too general (*d*), and * upon which no *habere facias* could be awarded, and therefore insufficient.

* [98]

TREMAINE, *Serjeant, contra*. If there be such a certainty of which the sheriff may deliver possession, it is well enough (*e*). In *Savell's Case* (*f*) there was neither the quantity or quality of the land described; but here is both: that was an ejectment of a messuage and a close called *Devecote Close*, containing three acres, but does not say whether land, meadow, or pasture, &c. This action is in nature of a *trespass*, and therefore it will lie *de uno pamaris* (*g*), or *de uno domo* (*h*); but it is not doubted but it will lie *de uno messuagio sive tenemento*, with this addition, viz. *vocat*. "the Black Swan (*i*)."

CURIA. All the certainty in this case is the addition of the name, "called *The Long Furlong*;" without those words the other are very uncertain.

- (a) 11. Co. 55.
- (b) *Jordan v. Cleabourne*, *Cro. Eliz.* 339.
- (c) *Cro. Jac.* 435.
- (d) *Yelv.* 118. *Stiles*, 202.
- (e) *Ld. Ray.* 1470.
- (f) 11. Co. 55.
- (g) *Bunbury v. Yeeman*, 1. *Sid.* 295.
- (h) *Cro. Jac.* 654. *Palm.* 337.
- (i) *Leon*, 210. *Str.* 695.
- (j) *Dist. per Twisden, Justice*, 1. *Sid.* 215. But see *Welch v. Ford*, 3. *Will.* 23. that an ejectment for a messuage or tenement is bad, *Stiles* 364. for the word

tenement being of a more extensive signification than the word *messuage*, it is uncertain what is thereby demanded, *Cro. Eliz.* 186. *Cro. Jac.* 125. and therefore an ejectment for a *tenement* only has been held bad, *Str.* 834. But the Courts have endeavoured to get over this objection, 3. *Will.* 23.; and accordingly an ejectment for "a messuage and tenement," and for "a messuage or tenement," has been held sufficiently certain *after verdict*, *Stewart v. Denton*, 1. *Term Rep.* 11.

Now

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Now names of places are neither necessary or material in giving possession, because they often change with the proprietors; and the sheriff must have sufficient notice out of the record itself to give possession. It is a doubt whether an ejectment will lie of a *close*, giving it a name without adding the number or quality of acres; for if an *affize* should be brought "*de uno clauso* VOCAT. Black Acre," it is not good. But here it is very uncertain; for the plaintiff does not shew how many acres of each in pasture and meadow; and then to say *HABENDUM clausam terræ* is yet more uncertain; for though the word "*terra*" in legal acceptation comprehends arable land, yet it does not relate to pasture: so nothing is said of that.

And for those uncertainties the judgment was reversed after two motions in *Trinity Term* following.

KNIGHT
against
SYMONS.

* Loder against Snowden.

* [99]
Case 37.

A PPEAL OF MURDER. The writ was returnable *à die Pasche* in *quindecim dies*; but there being a defect of pledges, and that being returned by the sheriff, *the appellant* came into court, and by his counsel prayed that he might find sureties, &c.

In an appeal of murder, pledges may be taken in court on the sheriff's return.

S. C. 12. Mod. 20. Rast. Ent. 46. Stra. 854. 1. Com. Dig. 521.

THE APPELLANT appeared at the *quarto die post (a)* by attorney, and then the defendant was arraigned.

Appellant's appearance.

PEMBERTON, Serjeant, took exceptions to the declaration, and prayed that the defendant might be discharged, because the appellant appeared by attorney, which in this case could not be, and therefore it was no appearance; and if so, it is a *discontinuance* of the suit upon record.

5. Burr. 2798.
Fitzg. 95.
Comy. 257.
10. Mod. 86.
11. Mod. 216.
12. Mod. 65.
Ld. Ray. 434.

THE COURT having taken time to consider, *the appellee* was brought to the bar a second time, and then *the appellant* was there in person, and sureties were taken; but the filing of the warrant of attorney (b) was rejected.

How appellee shall be arraigned.
S. C. 1. Salk. 64.
2. Inst. 313.

The same exception was then moved as before, *viz.* that an appeal being of a different nature from other actions, it ought to be *in propria personâ suâ instanter appellat*, and not *per attornatum*; so that there being an intermission, the whole is discontinued, and the Court gives no day over (c). It is true, in an appeal of *mayhem*, where the plaintiff appeared by attorney, as in this case, the defendant prayed that he might be demanded; which was done, and

In appeal, the appearance of the appellant by attorney, where he is not demanded, is not a *discontinuance*; but if demanded and he does not

appear in person, he shall be non-suited.—Dyer, 120. Latch. 173. 1. Bac. Abr. 186.

(a) See *Tucker v. Macpherson*, 1. Bar. B. 423; and *Smith v. Taylor*, 5. Burr. 2798. that the appellant has to the *quarto die post* to appear, 1. Com. Dig. 521. 8vo edit.

2703. 1. Com. Dig. "Attorney" (B. 5, 6.).

(b) But see *Jones*, 210. 5. Burr.

(c) But see *Smith v. Taylor*, 5. Burr. 2793. that the Court may, in its discretion, allow the appellee a special inter-
lance to plead any special matter.

he

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**ORDER
against
SNOWDEN.**

he not appearing *in propria persona*, was nonsuit (a). But the law is not that the appellant shall be demanded of necessity, because it is incumbent upon him to prosecute his appeal; and if there is any laches in him, then it is a discontinuance; and if he is demanded at any time, and do not appear, the Court will then record the nonsuit, for the appellant must be all the Term in court. There is a precedent in *Rastall's Entries* (b), where judgment was given against the widow for want of a declaration the first day of the Term. And therefore the appellant having now failed in his action, there can be no amendment; it being in an appeal of death, where no such favour is given either by the statute or common law.

* [100]

* CURIA. Though the declaration is void in itself, yet it is not all one as if there had been no declaration; it is only void so far as not to oblige the defendant to make answer to it: the appeal may be arraigned again, especially the appellant being the same day in court, and the whole Term shall be taken as one day. The defendant upon the arraignment should have prayed that the plaintiff might be demanded, because he could not appear by attorney, and then if he had not appeared in person he should be nonsuited.

He was not arraigned again, but the Secondary read the record. The defendant prayed *oyer* of the writ and return, which was returned, and read; and then by his counsel moved that it might be entered as it was, and that continuances from time to time might be entered, in regard he was going into the king's service; which was granted. Then he pleaded a conviction of *manslaughter*, which was insisted on to be a good plea *in bar* to an appeal of *murder*, &c. and had his clergy, &c. and prayed that his plea might be allowed. It was read by the Secondary.

The Court cannot deprive an appellee of clergy in order to give advantage to the appeal.

Kely. 106. 108.

1. Salk. 63.

3. Mod. 156.

10. Mod. 216.

The case of *Goring v. Deering* (c) was now cited, where it was the opinion of ten Judges, that a man indicted for *murder*, and found guilty of *manslaughter*, the Court ought not to ask him what he had to say, &c. thereby to let him into the benefit of his clergy, and this for the advantage of the person who intends to bring an appeal.

Tamen quære, for the law seems to be otherwise (d).

12. Mod. 374. Ld. Ray. 557. 1303. 5. Burr. 2801.

(a) 1. Inst. 313.

(b) Rast. Ent. fol. 46. placit. 1.

(c) 3. Mod. 156.

(d) It seems to be settled in the case of *Armistrong v. Lisle*, that the Court ought not to delay calling the convict to judgment, and that the conviction of *manslaughter* and the prayer of clergy

thereon may be pleaded in bar of an appeal for the same homicide, although the prayer of clergy is not made on the party being called to judgment, Skin. 670. 1. Salk. 62. Kely. 93. 2. Hawk. P. C. 536. 3. Mod. 159. *notis*; and see the case of *Smith v. Taylor*, 5. Burr. 2801.

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The King *against* Roberts.

INFORMATION FOR EXTORTION, setting forth, That there is a common passage and ferry-boat, &c. for transporting of people and cattle, &c. from such a place, &c.; that the usual rate for the passage of a man and a horse was a penny, and for a score of sheep two pence, &c.; that the defendant, being a common boatman, did carry at certain times several persons, and several score of sheep; and that during that time he did extort *de quibusdam* * *ignotis*, for the use of the said boat in passing over, &c. viz. *pro transportatione cuiuslibet equi* two pence, and *pro quibuslibet viginti ovibus*, ANGLICE score of sheep, four pence, *et sic secundam ratam*, &c. The defendant was found guilty.

Now several exceptions were taken in arrest of judgment.

FIRST, It is not said from whom he extorted those sums, but only *de quibusdam ignotis*.

SECONDLY, No time certain was mentioned when the wrong was done.

THIRDLY, It is not said how many score of sheep were carried over, or that the defendant carried any, but only that he took for every score, &c.

FOR *the defendant*. This is like *Martin van Henbeck's Case* (a), against whom an information was brought upon the statute of 18. Hen. 6. c. 17. (which requires that all pipes of wine shall be gauged, &c. before they are sold, and that so much of the price as it wants in measure shall be abated, on pain to forfeit the value to the king and the informer) stating that the defendant had sold several pipes of wine, none of which contained one hundred and twenty-six gallons, and that he had not abated, &c. but did not shew how much was wanting in each pipe; and, for this reason, judgment was against the informer.

FOR *the king*. It is not material to name the persons from whom the defendant extorted money; it is sufficient if the number be set forth: and therefore an indictment that *A. cum viginti septem aliis* engrossed, &c. has been held good (b). Nay though the number should not be set forth, yet it seems well enough, because the crime is the *taking*, and when the fact is found, it is not material from how many he took; the verdict finds the taking unlawfully, which could not be if the cause had not been shewed. The law was very nice in indictments till my LORD DYER's time, but he held that an indictment *quod* (the defendant) *felonice cepit bona cuiusdam ignoti* was sufficient (c); and the reason given by the book is, because the goods may be carried into another county, and so not known who had the property. So here the people may live

An information for extortion, stating that there is a common passage and ferry-boat over the river *Mursey*; that the usual rates were one penny for a man and horse, and two pence for a score of sheep; and that the defendant, being the common ferry-man, did, between such a day and such a day, extort from divers persons unknown divers sums of money, exceeding the ancient rate and price of passage, viz. for carrying over one man and a horse two pence, and for every score of sheep four pence, &c. is bad; for every extorsive taking is a separate offence, and ought to be precisely and distinctly laid; but here a number of offences are accumulated under a general charge.

S. C. 3. Salk. 198.
S. C. Comb. 193.
S. C. Carth. 226.
S. C. 1. Show. 389.
S. C. Holt, 363.
Ld. Ray. 475.
Stra. 1167.

(a) 2. Leon, 38. 2. Bulst. 317.

(b) Cro. Car. 380.

(c) Dyer, 99.

* [102] in remote parts who have been carried over the river, and the informer may not know who they are, or whither they are gone.

An information against a common ferryman for extorting from the passengers more than by custom he was intitled to receive, must precisely alledge the time when the extortion was committed.

* As to THE SECOND OBJECTION, that no certain time is mentioned, &c. it was said, that was not material *after verdict*; it might be a good exception upon a *demurrer*. As for instance, the statute of 3. Jac. 1. c. 5. requires that a popish recusant convict, who shall conform and go to church, shall, within the first year after his conformity, and every year afterwards, receive the sacrament, or otherwise for the said first year he forfeits twenty pounds, the second year forty pounds, and every year afterwards sixty pounds; and if he do receive it one year and neglect the next year, and so once a year, then for every year he is to forfeit sixty pounds. An information was brought upon this statute (a), setting forth, that the defendant *seipsum conformavit*, being a recusant convicted in due form of law, but had not received the sacrament for three years, &c.; upon not guilty pleaded, the informer had a verdict; and it was held, that the information was well enough, though no certain time of the conviction was set forth, nor before whom, &c.; but the Court allowed it to be a good exception upon a demurrer.

An information against a ferryman for extorting two pence for every score of sheep he had, if it do not state the number of score.

Then as to THE THIRD OBJECTION, it is not material to set forth the number of sheep, because *the taking* is the offence which is found by the jury as aforesaid; and the informer being a stranger, it is enough upon evidence to shew the fact, and not to set it forth particularly in the information. As where⁽¹⁾ a fishmonger was indicted on the statute 5. Edw. 6. c. 14. (b) for engrossing fish *ad intentionem* to sell them again, *contra formam statuti*, &c. which is at unreasonable prices (c); now though a fishmonger cannot be within that statute, or said to be an *ingrosser*, buying fish only, which is his trade so to do; yet if he *regrate*, that is buy fish in a market, and sell it again there or within four miles at unreasonable prices, he shall be within that statute, being indicted that he bought *ad intentionem ad revendendum, contra formam statuti*; which must be that he engrossed, and did not sell for a reasonable price; for if he did, it would have been given in evidence to the jury, but the fact was otherwise proved to them, and therefore the certain matter need not be set forth. So an information (d) *per viam corruptæ barganiæ et cheviantsiæ factæ*. the defendant did receive so much, &c. now though the bargain was not certainly set forth, yet the receipt being proved to the jury, that was held sufficient. * As to *Van Henbeck's Case*, it does not appear by the report, whether judgment was given after verdict, or upon a demurrer; but, be it as it will, his offence was against a statute, whereas this is an offence at the common law. An indictment against an innholder (e) upon the statute of 13. Rich. 2. c. 8. and 4. Hen. 4. c. 25. (f) for that he *existens communis stabularius ven-*

* [103]

(a) Cro. Jac. 365.

(b) Repealed by 12. Geo. 3. c. 71.

(c) Cro. Car. 314.

(d) Cro. Jac. 240.

(e) Cro. Jac. 610.

(f) These statutes are repealed by 21. Jac. 1. c. 21. and 28.

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didit diverfis subditis infra domum mansionalem; he was found guilty; and it was moved in arrest of judgment, that selling in his mansion-house *diverfis subditis* is no offence, if it was not in an inn, and to his guests; yet the indictment was held good.

THE KING
against
ROBERTS.

CURIA. Every taking is a several offence and extortion, and here are a whole heap of offences put together. It may be as well said that an indictment for battery will be good, setting forth that the defendant beat so many of the king's subjects between such a day and such a day (*a*). The cases cited by the counsel for the informer will not warrant this judgment. As to that upon the statute of *recusancy*, it is very uncertain, because it is not said when the defendant was convicted, or when he conformed, and therefore that was now held to be no law. The other case of *the fishmonger* was grounded upon the purview of the statute against forestalling and regrating; *ea intentione ad revendendum* is well enough, and the defendant to excuse himself ought to have produced some evidence at the trial to bring himself within the proviso of the act, *viz.* that he dwelled within a mile of the sea, and bought the fish to sell at reasonable rates.

The judgment was stayed.

THEN a motion was made, that the defendant might be bound to the *good behaviour*, several affidavits being produced that he continued his extortion to that time; but it was denied.

(*a*) See *Michel v. Neal*, Cowp. 828. 2. Hawk. P. C. ch. 25. sect. 82.

* *Barfdale against Drew.*

* [104]

Case 39.

WRIT OF ERROR upon a judgment in the common pleas, and the judgment was affirmed in the king's bench.

The plaintiff brought a *certiorari* to remove the recognizance itself into this court, which was given in the court of common pleas upon the allowance of the writ of error, so that he might sue out a *scire facias* against the bail.

If a judgment in the common pleas be affirmed in the king's bench, the Court may award a *certiorari* to remove the recognizance of bail taken in the common pleas, and then issue a *scire facias* against the bail.

But it was alledged, that the court of king's bench could not grant such a writ, because the recognizance is a record, which is not to be removed by *certiorari*; for that only removes *tenorem recordi*, and not the record itself. A *certiorari* like this was brought in *Easter Term* 10. *Eliz.* (*a*) to remove the record of a verdict out of the common pleas in order to bring an *attaint* against the jury; but it was disallowed for this reason, *viz.* that no such writ had ever been allowed; for the clerk of the treasury in this common pleas, upon the removal of the record itself, makes this

2. Roll. Abr. 382.
1. Roll. Abr. 891.

Hob. 195. Allen, 12. Salk. 564. 600. Barnes, 96. 207. 10. Mod. 278. 11. Mod. 110. 236. 12. Mod. 317. 384. 601. 646. Ld. Raym. 216. 469. 580. 609. 823. 838. 975. 1102. 1140. 1515. 2. Bl. Rep. 769. 1. Burr. 409.

(*a*) *Dyer*, 275 a.

entry,

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entry, viz. "*quod recordum remouetur virtute brevis de certiorand.*" which removes only *tenorem recordi*. For although *Mr. Fitzbert* (a) seems to be of another opinion, where he says, that "if a man recover in an *affize* of *novel disseisin* before the justices of *affize*, and before execution the record is removed into the chan- cery by *certiorari*, he may then send it into the king's bench," &c. this must be intended where a *writ of error* is depending.

E contra. Bail in inferior courts is taken upon THE ROLL itself, and so part of the record; and therefore when that is removed, the recognizance must come with it; and upon the affirming the judgment, a *scire facias* may be brought in the king's bench against the bail, who cannot plead "*nul tiel record*," because the recognizance is well removed (b). But in the courts at *Westminster* the recognizance is taken by itself, and is no part of the record upon THE ROLL; and therefore a *certiorari* may be to remove it, though it cannot remove the record itself.

And it was allowed accordingly.

(a) Fitz. N. B. 244. a.

(b) 1. Sid. 213.

* [105]
Case 40.

* Chieflly against Bond.

Hilary Term, 3. Will. & Mary, Roll 307.

The statute of Limitations extends to bills of exchange; and so all accounts stated, but not to accounts current.

AN ACTION ON THE CASE was brought upon a promise made by the defendant to pay a bill of exchange drawn fourteen years since.

S. C. 1. Show. 241.

S. C. Carth. 226.

S. C. Holt, 427.

1. Vern. 73.

256. 456.

2. Vern. 141.

235. 398. 540.

Free. Ch. 385.

9. Mod. 32.

10. Mod. 104.

12. Mod. 223.

Gillb. E. R. 224.

Fitzg. 81. 170. 289.

1. Peer Wms. 742.

2. Peer Wms. 144. 374.

3. Peer Wms. 143.

Stra. 836.

2. Saund 124.

2 Kcb. 612.

1. Lev. 287.

1. Sid. 485.

1. Vent. 89.

1. Mod. 70.

2. Mod. 311.

Comy. Rep. 709.

6. Com. Dig. "Temps" (G. 6.).

3. Ec. Abr. 602.

The defendant pleaded the 21. Jac. 1. c. 16. of Limitations, the words of which statute are, "That all actions of trespass, &c. all actions of accompt, and upon the case (other than such actions which concern the trade of merchandise between merchant and merchant, their factors or servants) shall be brought, &c."

The plaintiff replied, that the bill was a negotiating bill, and that it was upon an account between merchants, &c.

The defendant demurred, and had judgment, because the statute excepts only accounts which are *current* between merchants; and not any which are *stated*; for if an action is brought against a drawer for value received, that is no *account current*, but an *account stated*.

TRINITY

TRINITY TERM,

The Fourth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* *Philips against Bury.*

* [106]
Case 41.

MR. COLMER, a fellow of *Exeter College*, in *Oxford*, was The founder of expelled by *Dr. Bury*, the rector, &c. for incontinency. *Exeter College*.
The said *Mr. Colmer* appealed to the *Bishop of Exeter*, in *Oxford*, ap- pointed the Big who is THE VISITOR of the college. He received the appeal; shop of *Exeter* for the time being VISITOR, and directed that he should visit when requested by the college, and if not requested, that he should visit " *de quinquennio in quinquennium semel per se vel COMMISSARIUM* " *sum* ;" that if he should proceed to deprive the rector, or expel any scholars, and they cannot acquit themselves of the charge, they shall be removed without appeal, " *dummodo ad expulsiorem* " *scholaris concurrat consensus rectoris et trium ex septem maxime senioribus : et si ad* " *amotionem rectoris per hujusmodi episcopi commissarium etiam consentientibus quatuor ex* " *septem maxime senioribus*."—If, under these powers, THE VISITOR appoint a commissary to examine the appeal of a scholar expelled by the rector, HE may, within five years afterwards, appoint a visitation; and if the rector and scholars prevent him from exercising his visitatorial functions, he may, on *see rector* neglecting to appear to a summons to answer for this offence, deprive the rector without the consent of the four senior fellows for contumacy, although contumacy is not one of the offences mentioned in the statutes of THE FOUNDER; for the power of depriving any member for resistance to his authority is incident to his office of VISITOR; and the appointment of the commissary for the purpose of hearing the appeal not being a visitation, he had a right to visit within the five years. But if the VISITOR had exceeded his authority, the justice of this sentence of deprivation is not examinable in any court of law; for it is within his general visitatorial power, and THE FOUNDER, by appointing a VISITOR, has made him so far the sole and exclusive judge respecting the management of the college.—S. C. 1. Show. 360. S. C. Comb. 265. 314. S. C. 1. Salk. 402. S. C. Carth. 180. 319. S. C. 1. Ld. Ray. 5. S. C. Skin. 447. S. C. Holt. 402. 715. S. C. Show. C. P. 35. 1. Roll. Abr. 514. T. Jones. 175. 1. Mod. 83. Fitzg. 305. 3. Atk. 662. 10. Mod. 48. 2. Stra. 797. 1. Burr. 158. 200. Cases T. H. 218. 2. Will. 206. Cowp. 315. 1. Bl. Rep. 22. 1. Term Rep. 650. 2. Term Rep. 290. And see "The law of Corporations," by S. Kyd, Esq. title "VISITOR."

and

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granted an inhibition to any further proceeding against the appellant; and made an order requiring the rector and fellows to give an account of their proceedings, *sub poenâ juris et contemptus*. This order was served upon the rector and fellows; and then he sent a submissive letter to the bishop, and no farther proceedings were had for four months. Afterwards Dr. Masters was commissioned to determine this appeal in a formal visitation; for which purpose a citation was fixed on the chapel-door of the college, requiring the rector, &c. to appear on Saturday the twenty-third of March 1688-9. He appeared accordingly, and tendered a protestation; but the commissary proceeded to give sentence for Mr. Colmer to be restored, and awarded him twenty marks for costs. Some time after this sentence the rector and fellows proceeded against Mr. Colmer (as pretended fellow) for another act of incontinency, who appealed again to the bishop, and he received the appeal a second time, and resolved upon a visitation in person; and in order thereunto he sent a citation to the college, dated the sixteenth of * May 1690, and came himself to visit on the sixteenth of June following. When he came the chapel doors were shut against him. Then he appointed another visitation on the twenty-fourth of July following; and coming thither, the rector and fellows tendered a protestation under the common seal, because, by the statutes of the college, he was to visit but once in five years, and having visited so lately by his commissary he could not come again so soon. Whereupon the bishop suspended five of the seven senior fellows (having suspended eleven in all) and restored Mr. Colmer, and proceeded to deprive the rector; and then seven of the senior fellows, who were so after the suspension of the other, chose Mr. Painter to be the rector. Dr. Bury continuing still in possession, the lessor of the plaintiff brought an ejectment of a messuage in Oxford upon the demise of William Painter, &c.

See the pleading
at large, S. C.
2. Show. 360.
2d edit.

The defendant pleaded, that the messuage in the declaration, &c. is the freehold of the college; and that he being rector thereof did enter in right of the said college, &c. and traversed that the lessor of the plaintiff was rector at the time of the demise, &c.

The plaintiff replied, that the messuage belonged to THE COLLEGE, and that he was rector at the time of the lease made, *et hoc petit quod inquiratur per patriam*; and being at issue,

THE JURY found a special verdict, that Exeter College is a body incorporate, founded by Walter Stapleton, by the name of "rector and scholars, &c." and that several good laws were made by the said founder for the better government of the said college; and among the rest they find, that every scholar is enjoined to take an oath before the rector, &c. to observe the said laws, and if he shall be expelled never to appeal; that the Bishop of Exeter for the time being was, by a statute of the said college, constituted the ordinary visitor thereof, by which it was directed at what

times

time he should visit, viz. when required by the college, and *de quinquennio in quinquennium semel per se vel commissarium suum*, if not required; that at the time of *Mr. Colmer's* appeal the said bishop was VISITOR thereof. Then they find several statutes made by the founder, and amongst the rest the statute *de visitatione* as aforesaid. * They find another statute, by which it is provided, * [108]
“ That if the bishop proceed to deprive the rector or expel any scholar, and they cannot acquit themselves of the charge against them, then *amoveantur sine appellatione vel ulteriori remedio, dummodo ad expulsionem scholaris concurrat consensus rectoris et trium ex septem maxime senioribus tunc in universitate presentibus; et si ad amotionem rectoris per hujusmodi episcopi commissarium etiam consentientibus quatuor ex septem maxime senioribus supradictis.*” They find another statute entitled, “ *Propter quas causas RECTOR ab officio privari debet;*” in which statute several causes are particularly named, and by which it is directed in what manner he shall be removed, viz. he shall be admonished by the sub-rector and five senior fellows quietly to depart; which if he refuse (within a certain time therein limited), then that the bishop shall be acquainted with it, who is empowered to hear the accusation, and, if he find it true, to remove him from his office, &c. They find THE CHARTER of *Queen Elizabeth*, by which it was incorporated *de novo*, and being A HALL before was then made A COLLEGE. They find that, before the lease made, *James Colmer* was convicted before the rector of incontinency, there being present also at the said conviction the sub-rector and five senior fellows of the college; that he was expelled; and that he appealed to the bishop, who appointed *Dr. Masters* his commissary to hear and determine the same. They find, that the commissary came to the college on the twenty-second of *March* for that purpose, and did sit in the chapel; that *Mr. Colmer* appeared before him, but that the rector did not come, but made a protestation in writing, setting forth “ the oath of a scholar not to appeal against him for expulsion;” and therefore he denied the authority of the commissary to examine this matter; that, notwithstanding this protestation, the commissary proceeded to hear and determine the fact *ex parte*, and restored *Mr. Colmer*; that afterwards, upon the second removal of *Colmer*, the bishop issued forth a citation for a general visitation on the sixteenth day of *June* following; that he came to the college, and was hindered by THE PORTER from entering into the chapel, which is *locus visitationis*; that the said porter was then under the power of the rector, who departed *re infecta*; * that the bishop summoned another visitation on the twenty-fourth day of *July* following, against which the rector, &c. * [109]
protested (being within the time), insisting on the statutes of the college, which he was bound by oath to observe; that the bishop received this protestation *quatenus de jure*, and that the rector disagreeing to this visitation departed in contempt of the court; that he was summoned several times to appear, and refusing was pronounced *contumax*, and thereupon was deprived by the consent

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of *four* of the *seven* senior fellows not suspended, who were then resident in the university, but who were not seniors but by the deprivation of *Dr. Hern*, and by the suspension of *five* others; that after this sentence *Mr. Painter*, the lessor of the plaintiff, was chosen *rector* of the said college, &c. who made the lease, &c.

This was *the substance* of the special verdict (which was very long), so far as necessary for the understanding the points which were raised upon it, which were three.

FIRST, Whether the local statutes of the college did not take away the power THE VISITOR had to give such a sentence of deprivation? If not,

SECONDLY. Whether the concurrence of any other person was necessary to strengthen his authority?

THIRDLY, Whether this sentence was examinable in any other court?

As to THE FIRST it was argued, that though, by the statutes of the college, *the bishop* had power to make a formal visitation only "*de quinquennio in quinquennium*," yet these words are not restrictive of his power, but directory to him; for *eo nomine* he is A VISITOR, and has power to come at any time to hear appeals, and give redress upon complaints made (*a*), though not to make a formal visitation; and this is such a power which cannot be restrained but by negative words. *Dr. Masters* came not as a *visitor*, but for a particular purpose, to hear and determine the appeal of a single fellow. He was not to visit the whole college; his commission gave him no such authority: neither can the coming of *the bishop* himself on the sixteenth day of *June* be called a *visitation*. It is probable he might have an intention to visit, but was prevented by the

* [110]

opposition then made to his authority; and it would be a very absurd thing to say, that he being hindered did visit the college. If so, then his coming again in *July* must be a visitation warranted by the laws of *the founder*; for it was in general, to hear complaints, and to redress those disorders which were made by the former contumacy of the *rector* and fellows; and it is a vain thing to suppose that the intention of *the founder*, or of his laws, was, that such disorders should not be examined till five years afterwards.

20. Mod. 68.

22. Mod. 232.

THE SECOND POINT. There is no necessity for the concurrence of any other person to strengthen the authority of *the bishop*. When A VISITOR is appointed by *the founder*, the corporate body is subject to no other person; it is to be governed by him according to the local statutes made and published by *the founder*; and therefore the statute of 43. *Eliz.* c. 4. l. 3. which impowers commissioners

(*a*) But he can only decide private disputes between members of the college
Cowp. 378.

to visit hospitals, provides against their authority where any *special visitor* is appointed by the *founder* (a). In this case the *Bishop of Exeter* is appointed by the *founder* to be *visitor*; he is to have the continual inspection of this college; this is a right granted to him without any implication of law; he has *proprium et non alienam jurisdictionem*; for notwithstanding he is made by the appointment of another, yet he has an immediate authority in his own right *quatenus visitor*, which is vested in him by the law; he has the same power which was originally in the *founder*, and if any other person should endeavour to visit this college, he might have a prohibition (b). Now a *visitor quatenus* such has always a sufficient authority to deprive without the concurrence of any other person; and this authority is not abridged by the local statutes of this college; for though it be said, that if the *bishop* proceed to deprive the *rector* or expel a *scholar*, "*amoveantur dummodo ad ejus expulsiōnem concurrat consensus rectoris et trium ex septem senioribus*," yet this must relate only to the expulsion of a *scholar*; for though the *rector* be named, yet certainly this clause cannot concern his deprivation; for if it should, then his own consent is required to his own deprivation, which is very incongruous. The next clause is, "*si contra rectorem ad amotionem per episcopi commissarium, &c.*" There, it is true, the consent of four of the senior fellows is requisite; but that is only to his deprivation by the *commissary*, which is not this case, for he was deprived by the *visitor* himself. * This appears yet more plain by the latter end of the same clause, where it is said, "*non negamus ei*" (that is *rectori*) "*omnes exceptiones justas, &c. ad dominum episcopum*," which must be, that if he is deprived by the *commissary* he may appeal to the *bishop*; which shews that the power of the *commissary* is restrained to the consent of the four senior fellows, but the *bishop* himself, by virtue of that power which is incident to him as *visitor*, has an absolute authority to deprive without the concurrence of those fellows. This authority is derived out of that fulness of power which the *founder* had in himself. It is not like any jurisdiction of the courts at law, nor to be guided or examined by their rules. It is true, by this last clause, that original power which the *bishop* had *quatenus visitor* to deprive, &c. may seem to be restrained, and that there ought to be a deprivation by the *commissary* first, and then an appeal to the *bishop*; for otherwise it is like an original order made at a sessions of the peace to which any statute directs an appeal, and therefore void (c). But the cases are not parallel, because a justice of peace has his authority from particular statutes, but a *visitor* has his power by the common law. It is true, he is named by the *founder*, but he is vested with power by the law. In the next place, it would be very absurd to construe this local statute to extend to the deprivation of the *rector*

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(a) See St. John's College, Cam. bridge, v. Toddington, 1. Burr. 158.

(c) See Rex v. Aberford-East, 1. Ld. Ray. 798. 1. Conit's Edit. of Bott's

(b) Year Book 6. Hen. 7. pl. 14. Fitz. N. B. 42. 2.

Poor Laws, 121.

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by *the commissary*, and not by *the bishop*, because it cannot be imagined that a deputy can do what the person from whom he derives his authority cannot do; but if such construction should be made, that there must be first a deprivation by *the commissary*, then if he should refuse to deprive or agree with the fellows against *the bishop*, the power of A VISITOR would be of very little force. But admitting such a concurrence of *the fellows* necessary, it is sufficiently found by the verdict, and set forth in the pleadings, that the deprivation of *the rector* was with the consent of the *seven seniors* then in the university, and the statute doth not say that they shall be resident in the college, so that it is sufficient if they are the seniors of such who are then present; and it does not appear by the verdict, that *the five* who are suspended were after that suspension present in the college; but on the contrary it is found, they were called and did not appear.

- * [112] : * THE THIRD POINT. This sentence is not examinable in any other court (a).—This may be enforced from the nature of *eleemosynary corporations*, and from many authorities in the books (b). Now as to the nature of such corporations, they are by law subject to A VISITOR, the extent of whose power reaches as well to the head as members. It is true they have a freehold, but it is *sub modo*. The charity was given by *the founder*, and those who partake of it must receive it subject to such limitations as he thought fit to impose upon them. He has appointed a person to visit them who is *testatoris vices agere*; he is made *fidei commissarium*; and therefore the sentence given by him shall be presumed to be the sentence of *the founder* himself, which cannot be thought unjust, especially by those to whom his charity is extended; and if not unjust, then not to be examined elsewhere. Then as to the authorities in the books, the constant course has been to deny a *mandamus* when prayed to restore any person deprived or expelled from such a corporation (c); and there is no precedent in the old books of any restitution in such case to a monk, prior, &c. Dr. Coveney, president of *Magdalen College*, was deprived by the *Bishop of Winton*, who is visitor; he appealed to THE QUEEN in *chancery*; and it was resolved that it did not lie; for it was not within the statute of 24. Hen. 8. c. 12. because that directs to whom appeals shall be made in causes only of spiritual jurisdiction; but a college is not a spiritual corporation, neither is the act of deprivation of spiritual cognizance. It is true, the book says (d), that “because there was no appeal, *ex hoc sequitur* that the party may have an *affize*;” but certainly that could never be the opinion of my LORD DYER, because the governor of a college has

(a) Dyer, 209. 3. Mod. 265. Carth. 92. Cases Temp. Hard. 212. Skin. 13. 1. Bl. Rep. 22. 25. Andrews, 176.
1. Will. 266. (c) See 1. Com. Dig. “Mandamus” (B).
(b) See 1. Show. 74. 1. Sid. 71. (d) Dyer, 209.—See Lord Holt’s
1. Lev. 23. 2. Lev. 15. 2. Jones, opinion on this point, 2. Term Rep.
175. 1. Mod. 84. 3. Mod. 265. 355.

not sufficient estate in law to maintain an *assize*; for he alone, without the whole body aggregate, has no sole seisin or right in any thing belonging to the corporation; therefore that sequel cannot be law. But admitting it to be the opinion of the CHIEF JUSTICE DYER, it stands single by itself, without any authority to support it; it is no judgment in law; and my LORD HALE in *Appleford's Case* (a) affirmed, that an *assize* would not lie. And the reason is plain, because where a proper court has * an original jurisdiction, no other court will examine their judgment after sentence given. So is *Bunting's Case* (b), viz. If there be a sentence in the spiritual court to dissolve a marriage, though it be against the reason of our law, yet the Judges usually give credit to it, because the court which gave the sentence had the proper and original cognizance of the matter. The same reason was given in *Kenn's Case* (c), which was cited as a ground for the judgment in *Dr. Widdrington's Case* (d); and likewise in the case of *Allen v. Nash* (e), where a spiritual person was deprived by the high commission court for a contempt to the ordinary generally, without shewing any particular cause, and it was held good; for the court of king's bench gives credit to sentences given by proper judges. These are modern authorities, but grounded upon former resolutions in the law; for in the eighth year of *Edward the Third* one *Shirax* (f) was warden of a lay hospital, and deprived by the visitor; the archbishop being patron put in *Poplington*, and *Shirax* as warden brought an *assize*; the archbishop pleaded *nul tort, &c.*; and *Poplington's* plea was, that the demandant ought not to sue as warden, for he was deprived by THE VISITOR; and it was the opinion of HERLE, then *Chief Justice* of the common pleas, that whether the deprivation was right or wrong, it was not examinable in that court; for if he is deprived of his name of dignity by the ordinary, he must recover it again before he shall sue by that name (g). The court of *marshalsea* is restrained to three sorts of actions, viz. to *contracts* and *covenants* where both parties are of the household, to *trespasses* when either party is of the household, and to other trespasses within THE VERGE when neither plaintiff or defendant is of the household. An action on the case upon an *assumpsit* was brought where neither of them were of the household (h); the plaintiff recovered, and the bail of the defendant was taken in execution, who brought an action of false imprisonment, and had judgment. Now this matter was in a collateral action; yet no inference can be made from thence as to the case at bar; for the proceedings in the *Marshalsea* were *coram non iudice*, and therefore examinable in a superior court; but it does not follow

* [113]

(a) 1. Mod. 83. See 2. Term Rep. 356.

(b) 4. Co. 29. Moor, 169.

(c) 7. Co. 42. 2. Roll. Abr. 239.

(d) 1. Lev. 23. 1. Sid. 71. Raym. 31. 68.

(e) 2. Ro. Abr. 219. 699. 1. Jones, 393.

(f) Year Book 8. Edw. 3. pl. 69. b. See 2. Term Rep. 353. 355.

(g) Book of Assizes, 13. Ass. pl. 29.

18. Ass. pl. 31.

(h) Case of the Marshalsea, 10. Co. 76. b.

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from thence that this Court should examine the proceedings of a *visitor* in a formal and lawful visitation, when he has a full and proper jurisdiction to visit. * Neither is it any objection to say, that *the visitor* had a qualified power, viz. to deprive for contumacy and for no other cause; for if that is examinable here, then the Court takes upon them the office of *visitor*, which was never intended by the founder. It has been said, that *the rector* has a freehold in his office, and therefore ought to be protected by the law, and to have the privilege of applying himself to the king's courts for relief against any injury done by A VISITOR; but this objection also fails, for his freehold is gone by deprivation, for that works an absolute avoidance of it. If it should be farther objected, that disfranchisements of corporations, decrees made by commissioners of sewers, and proceedings of commissioners of bankrupts, are examinable in this court, yet from none of these can it be inferred that the proceedings before A VISITOR shall be likewise examined here; because in those former instances the persons are not trusted with a power of judicature, what they do is extrajudicial; but in this case THE VISITOR has the sole and absolute determining and judging of the actions of those who for the most part subsist by the charity of *the founder*; he is made a judge by the common law; and though it should be said that the king cannot commission any one to exercise such a despotic power, yet the common law gives that authority where the consent of all are involved,

E contra. For the defendant it was argued,

FIRST, This sentence of deprivation is void;

SECONDLY, If not, it is examinable in this court,

THE FIRST POINT. It is void, because if a *founder* appoint a *visitor*, and prescribe rules to his authority, both as to time, person, and place, and that power, thus circumscribed, be not exactly pursued in his proceedings, and in all its circumstances, it is not only error, but all is *coram non judice*. Now *the visitor* has no authority but what was given to him by *the founder*; and his power being restrained, if he exceed, then he acts without authority (*a*), and is in the same case as if the Justices of the common pleas should receive appeals of murder or felony, and attain the defendant; it is all void, for they have no such authority by their patent: so if a sheriff hold his tourn other than within a month after *Michaelmas* or *Easter*, all indictments and presentments taken before him are * *coram non judice*; because by the statute of 13. *Edw.* 3. c. 15. he is enjoined to hold it within that time. There can be no difference between these instances and the proceedings of a *visitor*, who must be subject to these particular rules and orders, by which his jurisdiction is established; and if it do appear to this Court that he has exceeded those rules,

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then his sentence will be pronounced to be void. Another thing to be observed is, that *the visitor* had no power to hold this court either by prescription or charter; it is neither found so by the verdict, or given to him: but if it should be admitted that he had power by charter, yet he could not give such a sentence, because such a judicial power could not be delegated by *the founder*, who was a private person, and who could not erect such a judicature; for what was done by him was only ministerial and extrajudicial; it was only a power of annexing laws and rules of government to those who partake of his gift and charity; but in matters of deprivation the proceedings must be in the ordinary course of law. Suppose a man should give his estate to particular persons upon certain trusts, &c. and, if any breach happen, that it should be examined by a particular person, and no other, this is not good; and yet a man has as much authority over his land as *the founder* had over his estate, who, though he might give it to whom and upon what conditions he thought convenient, yet it must be still subject to the common law, because it was so before any disposition made by him; which is the reason of the second point.

THE SECOND POINT. That the sentence of this *visitor* may be examined in the court of king's bench upon a collateral action.—Because that court has a superintendency over all such proceedings; which may appear by many instances of a higher nature. Where a power is given by act of parliament, or by letters patents, even in such cases their proceedings are examinable here (a). So are all proceedings of commissioners of sewers, who have a larger power given them by the statute of 23. Hen. 8. c. 5. to “survey and amend, &c. at their discretion and wisdom;” yet the Judges of the common law have interpreted that to be a legal wisdom and discretion (b). * So are also proceedings of commissioners upon the statute of bankrupts; for though they have an authority under THE GREAT SEAL, established by act of parliament, yet if they declare a man a bankrupt who is not so, he may traverse the bankruptcy and try it here; and yet these men are made by a higher power than a *visitor* is made; therefore his proceedings may certainly be enquired into by this Court. Now here if *the visitor* had pursued the very method prescribed by the laws of *the founder*, yet if *the rector* is not guilty, he can have no relief but here; and the rules to avoid judgments in inferior courts, either by writ of error or attain, are not applicable to a sentence given by a *visitor*. It is true, such sentences are judicial where the foundation is spiritual, because the ordinary is a spiritual judge by the law; but in a *lay corporation* it is otherwise, for their acts are but ministerial; and from their sentences an appeal may be brought, which my LORD COKE (c) calls a natural defence, and not to be taken away by any power. It is true also, that such

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(a) Dr. Barham's Case, 8. Co. 114.

(b) Rook's Case, 5. Co. 99;

S. C. 2. Brownl. 255. 11. Co. 93.

(c) 4. Inst. 340.

10. Co. 141.

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an appeal was denied in *Dr. Coveney's Case*, because his deprivation was temporal; but the book says, "*ex hoc sequitur* that an *affize* will lie, because he hath no other remedy." As to *Shirax's Case*, in the Year Book of *Edward the Third*, it is an authority for this very purpose; for that being a *lay foundation*, and he being deprived by the ordinary, brought an *affize*, and it was held good (a). If a corporation have power, either by charter or prescription, to disfranchise, and, upon complaint made, the court of king's bench award a writ to restore the party, or to shew cause, &c. and they return a sufficient cause, though false, there is an end of the writ (b), but the party has an action on the false return; so that an oppressed man is never left by the law without proper remedy. It is denied, that because *the founder* is the master of his own liberality, he may prescribe what rules he pleases to govern his charity, and so may make the sentence of a *visitor* final; for an appeal is a natural remedy, and not to be taken away by any power; it lies to this Court, which is the *supreme visitor*, and its jurisdiction is not to be abridged, even by act of parliament, without particular words. The statute of 24. *Hen. 8. c. 12.* provides, "that where a cause is commenced before the bishop or his commissary, that an appeal lies from him to the archbishop of the province" "within fifteen days after sentence;" and the statute of 25. *Hen. 8. c. 19.* gives appeals "from the courts of archbishops to the king in chancery," which court has power to issue a commission under THE GREAT SEAL to certain persons named by the king to hear the appeal, and in both cases their sentences are made definitive; yet my LORD COKE (c) is of opinion, that, notwithstanding such a definitive sentence, the king may grant a *commission of review*, because THE POPE could do it by the canon law, and the kings of *England* have by subsequent statutes the same authority which THE POPE had here. Now though a *commission of review* is not properly an *appeal*, yet it is a remedial course of proceeding; and it is not material by what name an injured person has remedy, so as he is relieved. Many more instances may be given to prove that the party grieved may have a remedy from a sentence given by persons who have lawful authority so to do; as justices of the peace may make a conviction of force upon their view (d); they are made absolute judges by the statute, and may make orders upon such conviction; yet such orders may be quashed in the king's bench upon a motion (e). *The visitor* is made a judge by *the founder*, but it is no consequence from thence that his judgment shall be final; for an arbitrator is likewise made a judge by the party, and his judgment is usually vacated in the king's bench without a writ of error, and no more respect ought to be had to the judgments of either than to a bye-law. But if such sentences of *visitors* were definitive, and not to be examined elsewhere, then great part of the nation in those days would not have been

(a) Fitz. Abr. "Affize" pl. 150.

(b) 11. Co. 99. b.

(c) 4. Inst. 341.

(d) 1. Sid. 156.

(e) Jones, 171.

subject to the rules and government of the common law ; for the rich men were got into guilds and fraternities, the men of learning into colleges and halls, the poor men into hospitals, and those called religious into monasteries ; now in all these the nation had a public interest, these were all places and people of public use and concern, so that it would be very absurd to say that they shall be governed by particular laws made amongst themselves, and exempted from the power and authority of the common law. This Court takes cognizance of the extent of the power of a judge, a sheriff, or an executor, as soon as named ; but it has no notion of a *visitor* ; it is a word affected by the canonists, who, being made by the *founder*, can have no authority but what is given to him, and may be compared * to an officer constituted by act of parliament, who has no other power than is given him by the act by which he is created, and therefore cannot prescribe as an officer at the common law (a). Then it was argued, that if the *visitor* had such a definitive power, yet here was no just cause to support this sentence, but a plain defect, which made it void, because he had no power at the time of this sentence given ; for by the local statutes he is to come but once in five years, &c. ; now this limitation of time is annexed to his power by the same law which made him *visitor*. His receiving the first appeal made by *Mr. Colmer*, and his commission thereupon granted to *Dr. Masters*, was a visitation ; for he has no power over the college but as *visitor*. It has been objected, that though this was in some measure an execution of his visitatorial power, yet it is not such a visitation which may restrain him to come again within five years, because it is not a personal visitation, but by his *commissary* only, and it was made to a particular purpose, *viz.* to hear an appeal, which he has always a constant jurisdiction to do *quatenus* VISITOR, so that it was not a general authority given to him to exercise the whole power of a VISITOR, which is to enquire into all abuses, &c. : but this is an objection of little force, because the coming of the *commissary* is the coming of the *bishop* himself, and though this visitation was to a particular purpose, yet there are no words in the statutes which give him power to make a general visitation ; and if he is not restrained from coming oftener than once in five years, then those words "*de quinquennio in quinquennium*" signify nothing. So it is plain that the *bishop* coming a second time so soon after his *commissary* made a visitation, for he administered AN OATH, which he could not do but as *visitor* ; and this seems yet more plain from the very words of the STATUTE *de visitatione*, which are, "*liceat domino episcopo, &c. quoties per rectorem et in ejus absentia subrectorem et quatuor alios ex septem maxime senioribus fuerit requisitus, necnon absque requisitione ullâ de quinquennio in quinquennium semel ad dictum collegium per se vel commissarium accedere.*" Now it is no objection to say that he may come oftener, because there are no negative words of this law to restrain him ; for the

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first and last words of this sentence "*licet accedere*" imply a negative, viz. that it shall be lawful for him to come then, and not as often as he will; and the words "*absque * requisitione semel*" do farther imply, that he is not to come without request but once in five years. Neither can it with any colour of reason be denied, that *Mr. Colmer's* appeal amounted to a visitation; for if the hearing, receiving, and adjudging appeals be part of the visitatorial power, then the hearing this appeal is a visitatorial act, upon which the party appellatant was restored. Again, although a visitor have power by the common law to execute such things as belong to his office *quatenus* VISITOR, yet he must be subject to the laws of *the founder*; because the authority which he has is chiefly derived from him; no part of his power is supplied by the common law, for he is A VISITOR *secundum tenorem statutorum*. Now the visitor has executed that power which he had not; for he is restrained by particular words in the statutes of the college to the concurrence of *four* of the senior fellows, who have equal power with him in the deprivation of a *rector*, and there was no such consent; for those who agreed with THE VISITOR were not seniors, but by the suspension of five who were their seniors: now a fellow of a college suspended remains a fellow still, his interest ceases for a particular time only, and may revive again; for he never ceases to be fellow but by deprivation, &c.; but certainly a *suspension* can with no pretence be called a *deprivation*, because by the express provision of these statutes there must be the consent of *the rector* to the deprivation of a fellow, which was not in this case. If the statutes should be otherwise construed, so as to give power to A VISITOR to let in other fellows by the suspension of their seniors, this would be to overturn the laws of *the founder*, who has given the rector a power *conjunctim* with him.

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32. H. 8. c. 1.

To which it was answered, that there was the concurrence of *four* of *such seniors*, which might very well satisfy the law of *the founder*; for though *the four* consenting were not *maxime seniores* (as required by his law) unless by the suspension of the other *five*, and though this is in the case of a penal law, yet they shall be construed to be such seniors as are intended by *the founder* to concur with THE VISITOR in deprivation; for penal laws may be construed according to equity. As for instance (a): By the statute of 28. Hen. 8. c. 15. it is provided, "that offences committed upon the sea within the jurisdiction of the admiral, shall be tried by commission under the great seal * directed to the admiral and three or four commissioners to be named by the LORD CHANCELLOR." Now if such commissioners are named by the LORD KEEPER, yet the commission is good, because the granting of such commissions is good; the granting commissions being a ministerial, and not a judicial act. So by the statutes of 28. Hen. 8. and 25. Hen. 8. c. 1. clergy is taken away from those who maliciously set houses on fire, and by the statute of 1. Edw. 6. c. 12. it is likewise taken away

(a) Dyer, 211. b.

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from several other offenders, and allowed in all other felonies, except such as are therein mentioned, and *burning of houses* is not there mentioned; then comes the subsequent statute of 5. & 6. Edw. 6. c. 10. reciting those three former acts; and "for that several robberies and felonies were committed since the making of those laws, &c." then it revives the act of 25. Hen. 8. c. 1. touching "putting *such* offences from their clergy touching *such* offences, &c." Now the relative *such* refers to the precedent matter, and not only to burglaries and felonies named in that act of reviver, but to such offences in mischief as those are; and therefore in *Alexander Poulter's Case* (a) it was held, that *burning of houses* should not be exempt from clergy (b). So in this case, though there was not the concurrence of *four of the seven* senior fellows but by the suspension of the seniors, yet there was the concurrence of *such* seniors, which was sufficient to fulfil the meaning of the *founder's* law.

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See 2. Hawk.
P. C. ch. 33.
f. 43.

Afterwards in *Trinity Term* in the sixth year of *William the Third*, by the opinion of THREE JUSTICES judgment was given for the defendant *Dr. Bury*; the substance of whose arguments, and the reasons given for their judgment were offered upon these two heads;

FIRST, That *the rector* was not well deprived:

SECONDLY, That this Court has power to examine the matter in a collateral action.

AND FIRST: The *visitor* has no greater power than that which was given by the *founder*. It is true, he is made a judge, but he has not an absolute jurisdiction, but is subject to such limitations and restrictions as are imposed on him by the laws of the *founder* (c); one of which is, that *the rector* is not to be deprived without the consent of the *four senior fellows resident in the University*, * which was not had in this case but by the suspension of their seniors. Now a fellow suspended remains fellow still; for that disability being removed, there is no occasion of any re admission; neither is the suspension a temporary deprivation, because that cannot be, by the constitution of the college, without the consent of *the rector*, which was never had. In the next place, *the bishop's* coming on the sixteenth of *June* was a visitation. He did an act proper to the office of a visitor; he examined the person about the citation upon oath, and this after a protestation made by some of the scholars, as coming so soon after his commissary within time: now he could not administer an oath but as *visitor*, and by the laws of the college he could not visit but once in five years; therefore he was restrained to come again in *July*, and by consequence the deprivation of *the rector* at that time must be void.

4. Inst. 200.

* [121]

(a) 11. Co. 29.

(c) See *Rex v. Bishop of Ely*, 2.

(b) 5. 2. Hawk P.C. ch. 33. f. 107. Term Rep. 290.
Cases in Crown Law, 2. Edit. 1795. 1017.

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SECONDLY, This may be examined in a collateral action in the court of king's bench. For the college is a temporal corporation, and the deprivation of the head is a temporal thing, and cognizable at law; the wisdom whercof has not trusted any one court with the final determination of matters though they arise within its jurisdiction, but writs of error and appeals may be brought to correct their proceedings. The nullity of this sentence of deprivation is no more than an erroneous judgment at the common law, which may grieve the party, but he is not without remedy in another court. In the *Book of Assizes (a)*, PARNING, who was then a Justice of the common pleas, took this difference: That where a warden of a chapel is deprived by one who had no title, he may have an *assize* to restore him by the name of warden; but where the ordinary who had a title deprives him, there he must first recover his name of dignity before he can have an *assize (b)*. And upon this distinction all the authorities will turn which were cited to exalt the power of a *visitor (c)*, for all the deprivations made by ecclesiastical persons, viz. by ordinaries, and those who have any spiritual jurisdiction, and likewise formerly by the HIGH COMMISSION COURT, who acted by the course of the ecclesiastical law, were sentences given by spiritual persons, whose proceedings are different from those at the common law, and therefore can no more be avoided by a civil action than by a writ of error. * And it is for this reason that when a bishop acts as ordinary, and exceeds his jurisdiction, yet this Court must give credit to his sentence, because it is given by a proper judge, and the law has allowed no other remedy but an appeal. But in the case of a temporal or lay corporation (as a college), their proceedings must be always subject to the determination of the common law; and therefore a wrongful deprivation by a *visitor* shall be examined here. The resolution in *James Bagg's Case (d)* seems agreeable with this opinion, where it was held, that if a citizen be disfranchised, and bring a writ of restitution, if a sufficient cause is returned (though false), restitution shall not be awarded: but the party is not without remedy; for he may have a special action on the case. If therefore a wrongful disfranchisement or deprivation by the persons who have authority in a lay-corporation may be avoided by a collateral action, *à fortiori* a void deprivation may be examined in this court.

HOLT, *Chief Justice, contra (e)*.

FIRST, The question is, Whether the sentence of deprivation of the *rector* by the *bishop* as *VISITOR*, has made his place void or not? And he held that it was made void by the sentence.

(a) 13. Assize, pl. 2.

(b) Broke's ABR. title "Nofme" pl. 37.

(c) Moor, 228. 781. Jones, 393. Cawdre's Case, 5. Co. 1. S. C. 2. And. 122. S. C. Poph. 59. Kenn's Case, 7. Co. 42. S. C. Cro. Jac. 186. S. C. Jenk. 289. Bunting's Case, 4. Co. 29. S. C. Moor, 165.

(d) 11. Co. 93. S. C. 1. Roll. Rep. 173. 224. But see 2. Term Rep. 355.

(e) See 2. Term Rep. 346. a note of LORD HOLT's argument in delivering his judgment in this case, taken from his own *manuscript*.—Skinner's Report of his Lordship's argument is nearly *verbatim*. Skin. 475.

SECONDLY,

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SECONDLY, Admitting THE VISITOR had power to give such a sentence, Whether it is examinable in this court? And he held it was not.

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As to THE FIRST QUESTION it is agreed, that *the bishop* had power to make a visitation but once in five years, unless required; but it was denied that the coming of *Dr. Masters* was a visitation, who came for a particular purpose to hear a single appeal. Now though A VISITOR may be restrained by particular laws of *the founder* to visit *ex officio* but once in five years, yet he has a constant and standing authority given to him by the law of the land to determine all differences whatsoever, which may arise where he is visitor in the mean time, and from whose sentence there is no appeal. This was the opinion of HALE, *Chief Justice*, in *Daniel Appleford's Case* (a), that if there is a proper jurisdiction in a *local visitor*, and he has determined the matter, no *mandamus* will lie; and therefore he denied it to restore a fellow of a college, which is a case in point. * To make this matter a little more plain: By the law diocesan bishops can visit but once in three years, yet their courts are always open to hear and determine offences; now in this case if the coming of *the bishop* in *June* was a visitation, then he could not by the laws of the college visit again *ex officio* in *July*. But that in *June* could not be a visitation; for his calling over a few names, and administering an oath could not make it so, that being only to call them to an account for contumacy, in order to punish them when he should make his formal visitation in *July* following. It has been urged, that the deprivation was void, because without the consent of *four* of the *seven* senior fellows; but their consent is not necessary to the deprivation of *the rector*, even upon the construction of the statute *de visitatione*; for *the bishop* being ordinary visitor of the college (*quatenus* such), he is invested with an ample power to remove and deprive; and there are no words in that statute to qualify his power. The words are, "*si ad privationem RECTORIS aut expulsionem SCHOLARIS, &c. dummodo adejus expulsionem concurrat consensus RECTORIS, &c.*" so that *expulsion* must be applied to a scholar, and *deprivation* to the rector; for it is impossible that the words "*ejus expulsionem*" should refer to *the rector*, for then he must consent to his own expulsion. By this statute *the rector* has a benefit which is denied to *the scholars*, *viz.* an appeal; for if he be deprived by *the commissary* (which must be with consent of *four* senior fellows), he may appeal to *the bishop* as visitor; if a scholar is in fault, *amoveantur sine ulla appellatione*, so that the power of *the commissary* is abridged: but there is no qualification of *the visitor's* power. It is true, the suspension of a fellow is no impediment to his consent, for he remains a fellow; but his consent being in no wise necessary, it is not material whether suspended or not.

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(a) 2. Mod. 24. See also 10. Mod. 50. Post. 236.

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As to THE SECOND QUESTION, this matter of deprivation is not examinable in this court by a collateral action. The reason is obvious, because THE VISITOR is the proper judge, whose sentence in this case is definitive. There are two sorts of corporations aggregate; one for the public administration of justice, and the other for private charities. The first of these being of public government, is to be regulated and reformed by the Judges of the courts of * *Westminster Hall*: of these there is no *founder* or *visitor*; they subsist by virtue of the king's letters patents, and the law supplies all defects in the constitution; for though they may have no express power granted to make laws, yet such power is incident to their incorporation, and such laws made by them are always subordinate to the laws of the land (a): now no man can say, that A COLLEGE is such a corporation aggregate as has been described. The second sort of corporations is private, and the *founder* and his heirs are *visitors*, and they shall always supply the defective constitution of such a corporation: this is to be governed by particular laws of their own making, and the laws of the land seldom or never interpose but where the *founder* has appointed no *visitor*; and then it descends to his heirs (b), who are to be perpetual visitors of such corporations which subsist by the charity of their ancestors, and those who are supported by it are to be regulated by particular laws and constitutions enjoined by the *founder* of the charity, and not by the common methods and rules of law. The case of *Shirax* in the Year Book (c) is not applicable to this purpose; for he having a *donative*, and being deprived by the *Archbishop of York* as ordinary and visitor, and another being collated, the question was, Who was visitor? And it appeared plainly it could not be the *Archbishop*, because the matter was not spiritual; it was in the case of a *Lay Hospital* which had no spiritual possession; it was neither college or convent, and for that reason the *assize* was held good, which proves nothing in the case of a *spiritual corporation*; for if the deprivation had been by a proper visitor, and one who had a lawful jurisdiction, his sentence would have been final, and no *assize* could have been brought to examine it. Another reason why this sentence is definitive, and the cause thereof not to be examined, appears in the *Book of Entries* (d), viz. In the pleading of a sentence of deprivation there is no necessity of shewing the cause, for that is not traversable, which is a very good argument that the cause is not to be enquired into. The reason given why this deprivation is examinable by a collateral action is, because from such sentence there lies no appeal; and it is agreed on all sides, that it is not to be examined in this court if an appeal does lie. But if this reason fail in cases of a like nature, then it will be of little force here. * Now an appeal will not lie from a sentence given by a proper visitor, though there is no cause expressed in such a sen-

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(a) Hob. 286. 1. Roll. Abr. 513.
(b) 6. Com. Dig. "Visitor" (A. 4.).

(c) Fitz. Abr. "Assize" pl. 150.
(d) Rast. Ent. 1.

tence;

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tence; and this appears upon the statute of 1. Eliz. c. 1. f. 18. (a), by which the high commission court was erected, and power given to the queen and her successors by letters patents to authorize commissioners to exercise ecclesiastical jurisdiction. A parson was deprived for contumacy, not setting forth any particular act; and the sentence of the commissioners was held good, as if given by the ordinary himself, and not to be examined in a temporal court, because the proceeding was according to the ecclesiastical law against a spiritual person (b). Dr. Coveney had no remedy upon his deprivation by the Bishop of Winton; for it was adjudged that no appeal would lie; and the inference in the report, viz. "ex hoc sequitur that an offize will lie," cannot be law, because the head of a college cannot maintain an offize in any case whatsoever; for he has no sole seisin; he has no estate to support a real action; he is only a visible person of the body aggregate, but has not the least title to the rents and profits of the college till after a dividend made.

PHILLIPS
against
BURY.

But, notwithstanding, JUDGMENT was given for the defendant by the opinion of THE OTHER THREE JUDGES; which judgment was reversed in the house of peers in Hilary Term, in the seventh year of William the Third.

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AFTER this reversal a motion was made in the court of king's bench, that the judgment in this court being "quod querens nil capiat per billam," and a writ of error being brought upon that judgment in parliament, and the judgment being there given, "quod iudicium præd. revocetur et quod præd. RICHARDUS PHILLIPS repleat per billam, &c." that now the plaintiff might have judgment in the court of king's bench to recover the term, because the record itself was always here, and only a transcript thereof sent into the parliament.

But it was objected, that the court above should have given a new judgment in pursuance of what was done there; and therefore the plaintiff must bring a new action to recover the term.

To which it was answered, that the king's bench will give a new judgment upon the reasonableness of the matter, and upon consideration of several precedents in THE EXCHEQUER CHAMBER resembling this case; for if the defendant have judgment in the king's bench which is afterwards reversed in THE EXCHEQUER CHAMBER, and the record certified here, the Court has given a new judgment: and this was done in the case of *Faldo v. Ridge* (c), where in trespass the defendant pleaded * in bar, &c. the plaintiff replied, &c. and upon a demurrer to the replication the defendant had judgment in the king's bench, which was reversed in THE EXCHEQUER CHAMBER, et quod querens recuperet, &c. and the record being

In ejectment, if judgment be given in the court of king's bench, that the plaintiff nil capiat per billam, and, on a writ of error brought, the house of lords give judgment, that the said judgment given in the king's bench shall be reversed and the plaintiff restored, &c. the court of king's bench cannot give a new judgment, that the plaintiff shall recover over his term, &c.; but if the remitter of the record is not entered, such judgment may

be added by the house of lords.—S. C. Carth. 180. S. C. 1. Show. 365. S. C. Show. C. P. 57. S. C. 1. Salk. 403. Yelv. 74. 118. Cro. Car. 512. Cro. Jac. 534. 2. Saund. 256. 1. Salk. 401. Fitzg. 67. Stra. 973. 1055. 10. Mod. 225. 1. Peer Wms. 685. Ld. Ray. 990. 1175. 5. Com. Digest, "Pleader" (3. B. 80.). 2. Bac. Abr. 230, 231.

(a) Repealed by 17. Car. 1. c. 1.

(b) *Allen v. Nash*, 2. Roll. Abr. 219.

(c) Yelv. 76. Cro. Jac. 106.

remanded,

PHILIPS
against
BURY.

remanded, this very Court awarded a writ of enquiry, and upon the return thereof a new judgment, that the plaintiff should recover his damages, which was contrary to their former judgment. It is not necessary that the court which reverses a judgment should give a new one, or the same which that court should do who gave the first judgment: as, if a writ of *false judgment* be brought in the *common pleas* upon a judgment given in a court of *antient demesne*, and reversed, the plaintiff shall not have judgment there to recover seisin of the land, but shall be restored to his action; upon which he shall have such judgment as is usual to be given in the inferior court. So if a *bill in chancery* be dismissed, and, upon an appeal to the parliament, that dismissal be reversed the court of chancery thereupon always gives relief suitable to the judgment in parliament; for upon such appeals and writs of error brought they have no rolls before them, but only *tenorem recordi*, upon which no judgment can be properly given; and therefore if the court of king's bench, where the record is, should not give judgment, it would be a very imperfect record, as standing without any judgment, because by the reversal the first judgment is erroneous. The reversal also above would be invalidated by this means; for there can be no award of execution there, and therefore it is most agreeable to reason that the court which sends forth the execution should also give the judgment.

Encontra. A new judgment ought to be given by that court which reverses the former. And it is no argument to say that THE EXCHEQUER CHAMBER does not give new judgments upon the reversal of the old upon *demurrers*; for that court has only a power to affirm or reverse in such cases; it cannot award a writ of enquiry of damages; and that was the reason of the new judgment given in the court of king's bench in the case of *Faldo v. Ridge* after a reversal in THE EXCHEQUER CHAMBER; it was a judgment given in the king's bench upon a demurrer. But where judgments are given in THE KING'S BENCH for defendants, either in ejectments or special verdicts, and reversed in THE EXCHEQUER CHAMBER, they may award a judgment *quod recuperare debeat*; and that was the case of *Sarsfield v. Witherly*. * Now the judgment above is not so much; it is *quod judicium præd. revocetur*, &c. which is only a stop to the king's bench to execute the former judgment, and therefore cannot be construed or extended to give a new judgment for the defendant. But admitting the king's bench could give a new judgment upon the reversal above, and such as should have been given upon the original record, yet that must be understood when the judgment was given for the defendant; but in this case the judgment for the defendant is reversed. Besides, the authority of THE EXCHEQUER CHAMBER is established by act of parliament (a), and limited to particular errors of judgments in the king's bench, which judgments they must either affirm or reverse by the express direction of the statute, which enacts, "that

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after such affirming or reversal the record must be brought back again into the king's bench, that farther proceedings may be had thereon, as well for execution or otherwise; so that these cases do not resemble this. It has been said, that the parliament seldom gives any new judgment, but only reverses or affirms the judgment below; but in the case of *Noel v. Nelson* (a), they did more than affirm the judgment below, for they gave an award of execution and costs for delay upon the writ of error: and this may be very well done; for after THE CHIEF JUSTICE is commanded, by the writ of error, to send the record to the king in parliament, that the proceedings below may be examined, then follow these words, "*UT INSPECTIS recordo et processu prædictis ulterius inde de assensu dominorum spiritualium et temporalium in eodem parlamento existen. &c. fuerit faciend.*" which import that something else may be done besides reversing or affirming the judgment. It is plain that judgments have been given by superior courts upon reversals, and sent down to the courts below to execute; as where error was brought in the king's bench upon a judgment in *Ireland* in ejectment, where it was given for the defendant and reversed here, and the judgment was, "*quod querens recuperet terminum*;" and because, by the writ of error, the record itself was removed, and must therefore remain as a record here after the reversal, the king's bench made a *mandate* to THE CHIEF JUSTICE there to see execution done.

Prædictis
agitur
Bury.

But at another day HOLT, *Chief Justice*, delivered the opinion of the Court, that they had executed their authority by giving the first judgment, and that there was no precedent of the court of king's bench giving a new judgment after a new reversal above.

* Whereupon the *remittitur*, by which the record is sent back to the king's bench, being not entered, THE COURT OF PARLIAMENT was moved upon this matter, and a new judgment was added, "that the plaintiff *recuperet terminum suum præd. &c.*"

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(a) 2. Saund. 225.

Russel's Case.

Case 42.

IN a prohibition, to the COURT OF HONOUR held before the earl marshal upon a libel there, setting forth that there are three kings at arms, *Garter*, *Clarenceux*, and *Norroy*, and six heralds skilful in descents, pedigrees, and arms, to whose offices it doth belong to marshal funerals of great persons at request, &c. and that *Russel* and others had encroached upon their respective offices by taking upon them to paint arms, and marshal funerals, &c.

If the court of honour, before the earl marshal, proceed against a person for painting arms and marshalling funerals contrary to heraldry, a prohibition will lie, as well as a *privy seal*.

The defendant suggested the statute of MAGNA CHARTA, viz. that no man shall be disfeised of his liberties and free customs but by judgment of his peers, &c.

2. Roll. 87. 1. Sid. 352. 2. Lev. 134. 7. Mod. 128. 2. Hale, 500. 2. Bac. Abr. 602, 603. 2. Hawk. P. C. 15, 16. 3. Com. Dig. "Courts" (E. 2.) Show, Cal. in Parl. 63. 6. Com. Dig. "Prohibition" (A. 1.). 4. Bac. Abr. 259.

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I

THE

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RUSSEL'S
CASE.

THE COUNSEL *against the prohibition* insisted that it would not lie to this court of honour. It is a court by prescription for degrees of honour, and the heralds there proceed according to ancient customs, and being skilful in descents and pedigrees, do at the request of several persons marshal funerals; and if ignorant men should be suffered to attempt things of this nature, great confusions would follow amongst noble families. They have as absolute a determination in matters of honour, pedigrees, descents, and armories, as the chancery has in matters of equity, and no prohibition was ever yet granted to a court of equity. This being a court of great antiquity, has endeavoured several times to extend its jurisdiction; and therefore several acts of parliament have been made to restrain them in their proper limits, but care was always taken to preserve their rights. By the statute of 13. *Rich. 2. c. 2.* the authority of the *earl marshal* is declared, and a remedy is given where it is abused; but it is not by way of *prohibition* by the courts at law, but by a *privy seal* from the king directed to the *earl marshal* not to proceed where he has no authority: and for these reasons it was prayed that no prohibition might be granted.

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* *E contra.* It was admitted that THE COURT OF HONOUR has a jurisdiction to marshal arms, but the plaintiff in the prohibition had not offended against that court, for he had all his escutcheons from the heralds; and as to marshalling funerals, there are no negative words in the statute of 13. *Rich. 2. c. 2.* to restrain him; neither have the heralds any such power by the original patent by which they are incorporated; they may as well complain against every upholsterer who hangs a room with mourning, and against every parish-clerk who assists at funerals, as against the plaintiff in this case; therefore they ought to be prohibited.

CURIA. Upon the matter set forth in the libel, they might maintain an action on the case; for if true, it is a wrong done to their possessions by doing such things as belong to their respective offices. Here is no complaint of any thing done against the rules of honour; and therefore this matter cannot be determined, unless a prohibition be granted, and the other side demur to the suggestion. Many prohibitions have been granted in cases of like nature, as to the dutchy-court in matters of equity. And so a prohibition was granted in this case (a).

10. Mod. 264.
12. Mod. 445.
Ld. Ray. 578.

(a) See the case of *Oldis v. Donmille*, Show. Cases Parl. 58. to 67. Co. Lit. 391. 2. Rushw. 107.

Cafe 43.

Culliford *against* Blandford.

If a statute give a penalty to the party grieved within three months, and, on his neglecting to sue for it within that time, to any person who will sue for the same — *Quære*, Whether a stranger who sues for the whole penalty, be a *common informer* within 31. *Eliz. c. 5.* and thereby bound to bring his action within a year? but if so, suing out a *latitat* within the year is a sufficient commencement of the action. — S. C. 1. Show. 353. S. C. Comb. 194. S. C. Carth. 212. S. C. 12. Mod. 26. S. C. Holt, 522. Ld. Ray. 78. 682. 6. Mod. 219. 3. Bac. Abr. 506. Dougl. 235. 1. Bl. Rep. 312.

The

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The statute enacts, "That every time that any mayor shall return other than those which be chosen by the citizens and burgeses where such elections shall be; shall incur and forfeit to THE KING forty pounds; and moreover shall forfeit and pay to every person chosen citizen or burgeses to come to parliament, and not returned by the mayor; or to any other person; who, in default of such citizen or burgeses so chosen, will sue; forty pounds; for which every citizen and burgeses so grieved severally, or any other person which in their default will sue, shall have his action of debt against the said mayor, his executors or administrators, to demand and have of the said mayor forty pounds, with his costs in such case expended. PROVIDED ALWAYS, that every citizen and burgeses so in due form chosen, and not returned as aforesaid, shall begin his action of debt within *three months* after the same parliament commenced, and proceed in the same suit effectually without fraud; and if he do not, another that will sue shall have the said action of debt, as it is before said, and shall recover the same sum, with his costs spent in this behalf, in manner and form aforesaid."

COLLIFORD
against
BLANDFORD.

The plaintiff was a *stranger*, who, after the three months, and before the end of one whole year, sued out a *latitat* against the defendant; but this was within a year after the offence committed.

THE FIRST QUESTION was, Whether the plaintiff was a *common informer*, and so ought by the statute 31. *Eliz. c. 5.* to bring his action within a year after the offence? In the preamble of that statute it is said, "That no person other * than the party * [130] "grieved shall be received to inform upon a penal statute;" and then it is enacted, "That where a forfeiture is given to the king only, the action shall be brought within two years after the offence; but if it be to the king and prosecutor, then it must be within a year."

SECONDLY, If the plaintiff shall be taken to be a *common informer*, then whether the suing out this *latitat* is a commencement of the action?

1. Barnes, 14.
Stra. 550. 736.
Ld. Ray. 383.
434. 553. 885.

EYRE and GREGORY, *Justices*, held the affirmative in both points; but they insisted chiefly on the FIRST POINT, that the plaintiff is no *common informer*, because the penalty was given to the prosecutor, and no time limited by this statute when he should commence his action. He stands now in the place of the party grieved, who did not sue within the three months limited by the act; and nobody will say that he is a common informer.

1441.
12. Mod. 26.
1. Peer. Wms.
412. 437.

The other two Judges doubted of this point, but were divided upon the second.

DOLBEN, *Justice*, was of opinion, that the suing out of the *latitat* within the year was a good commencement of the suit, and sufficient to avoid the statute.

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CULLIFORD
against
BLANDFORD.

But HOLT, *Chief Justice*, held, that a penalty being given to the king as well as to the prosecutor, if he had brought his action for the whole eighty pounds *tam pro domino rege quam pro seipso*, he had been within the statute of 31. *Eliz.* c. 5. and a *common informer*; but here the action was brought only for one forty pounds, which makes some alteration.

But as to THE SECOND POINT, a *latitat* was never yet construed to extend to a statute where a penalty is given to the prosecutor, and therefore cannot be a commencement for a suit upon a penal law (a). It is otherwise where the party is limited and barred from his right by any statute for not prosecuting in time; therefore if the first point is not for him, the last is against him.

But yet the plaintiff had judgment (b).

(a) See *Coomb v. Pit*, 3. Burr. 1423. that suing out a *latitat* is a sufficient commencement of a suit to save the limitation in a *penal statute*; but it must be *in fact*, and not by *relation*, sued out within the year, Bull. N. P. 195.; and the real day of suing out the writ, which shall be considered as the commencement of the suit, may be shewn in pleading. *Morris v. Pugh and Harwood*, 1. Bl. Rep. 312. 3. Burr. 1241.—See *Strat.* 350. 734. *Ld. Ray.* 1441. *Dougl.* 315.

(b) A writ of error was brought upon this judgment, S. C. *Carth.* 234. S. C. *Holt*, 522.; but it does not appear whether the judgment was affirmed or reversed, Bull. N. P. 195. It is said, in the case of *Chance v. Adams*, Easter Term, 8. *Will.* 3. that it was resolved by a majority of the Judges present upon the arguing of this writ of error in the EXCHEQUER CHAMBER, that where the informer ought to have the whole penalty, the statute 31. *Eliz.* c. 5. does not ex-

tend to it, because it is not within the words of the act; and penal statutes are not extendible by equity. But *TREBY*, *Chief Justice*, *POWELL*, *Baron*, and *ROXBY*, *Justice*, were of a contrary opinion; for if the informer should be bound when the queen was joined with him, much more should he be bound when he sued by himself. 1. *Ld. Ray.* 78. But *COMYNS*, *Chief Baron*, in abridging this case, says, that he shall not, in such case, be reputed a common informer. 4. *Com. Dig.* 8vo. 410. In the case of *Frederick v. Lookup*, on the statute 9. *Ann.* c. 14. against excessive gaming, by which the party grieved may, within three months, recover back the money lost; and in case he shall not sue, any person may recover the treble value for himself and the poor of the parish; the Court held, that an informer must sue within the year, on default of suit by the party grieved within the three months, for that it is within the 31. *Eliz.* c. 5. 4. Burr. 2018. Bull. N. P. 195.

* [131]

Cafe 44-

* Smith against Milford.

If a man seised in fee of lands covenant upon the marriage of his son to levy a fine, to the use of his son in tail, and three years afterwards make a will, by which he ratifies and makes good "all those my estates granted in marriage to my son, according to the writing made by me in trust," the son shall take an estate tail in the lands by the will, although no fine was levied pursuant to the intended deed of settlement.—S. C. 1. *Salk.* 125. S. C. 1. *Show.* 350. S. C. *Comb.* 195. 1. *Andr.* 188. 1. *Vent.* 66. 1. *Lutw.* 96. *Cro. Eliz.* 113. 20. *Mad.* 99. 1. *Vezzy*, 437. *Comyns*, 345. 3. *Com. Dig.* "Devile" (N. 2.). *Ld. Ray.* 203. 1282.

year

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year of *Charles the First*, and made between him of the one part, and *John Perenchard* and *John Cadidge* of the other part, in consideration of a marriage then intended to be had between *George* his second son with *Mary Perenchard*, and in consideration of a portion of two hundred pounds, &c. and for the settling his land upon the trusts therein declared, covenant with the said trustees to levy a fine of his said estate before *Michaelmas Term* next following, to the use of himself and *Elizabeth* his wife, and to the survivor of them for life, then to *George* his son for life, then to *Mary* his intended wife for life, and afterwards to the heirs of the body of the said *George* to be begotten on the body of the said *Mary*, remainder to his own right heirs. There was no fine levied; but three years after the sealing this deed *John Dalacourt* made his will, in which (amongst other things) there was this clause: "ITEM, I do ratify and make good all those my estates made or granted in marriage to *George* my son, according to the writing made by me in trust." The jury found, that there was no writing made by him in trust to any other person or persons whatsoever, other than the deed of the fifth of *June*, which they found to be the very deed of *John Dalacourt*. They found that the said *John Dalacourt* had issue *John* his eldest son and heir, who entered and died, leaving issue *Mary* his only daughter and heir. They find that *George* his second son and *Mary* died, leaving issue a son, who was lessor of the plaintiff, &c.

SMITH
against
MILFORD.

The question was, Whether the will did supply the defect in the deed, which without a fine would not operate to create an estate tail in *George* the second son?

It was argued that it did, and that the plaintiff had an estate tail; for in wills, if the intention be certain, though not fully expressed in words, it is well enough. * Now the intention of the testator is very certain here, from the nature of the thing devised, viz. "I do ratify all those my estates granted to *George* in marriage:" by which words he takes notice that *George* was married, that he granted an estate to him; which is a complete description of the deed, especially since it is found that there was no other writing. And this agrees with the rule of law, that a devise must be taken according to the intent of the testator, so as such intent is expressed in the will; and therefore since the statute of Uses, if a devise be that his feoffees shall convey the land to N. and his heirs, this is an immediate devise of the land itself, by reason of his intention (a). Nay, it has been held, that a man might devise an use before the statute (b); for if he had made feoffees to uses (which he could not by the common law, though he might by custom, before the statute (c), and afterwards he had devised that the feoffees should convey such an

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(a) 1. Roll. Abr. 611. Hob. 32.

(b) Powell on Devise.

(c) It must be after the statute
32. Hen. 8. c. . of Wills.—See Bro.

Abr. "Devise," 48; William Lin-
gen's Case, Dyer, 323.; Buffield v.
Biburo, Poph. 188.; and Gieve's
Case, 1. Leon. 313.

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SMITH
against
MILFORD.

estate to *W.* this is also a good devise, because of the intention of the party (a). But a case which comes nearer to this in question is that of *Molineux v. Molineux* (b), as reported by *Justice Croke*, viz. It was a devise of several rents expressed in several writings; and it was adjudged a good devise of the rents themselves; in which case it is said to be the opinion of the Chief Justices, &c. that if a feoffment be made to divers uses without livery, which is as great a defect in the execution of that conveyance as a fine is in this at bar, and the feoffor afterwards devise the same lands in such manner, and to such persons, as he appoints by the deed of feoffment, it is a good devise of the land itself.

1. Vern. 3 340.
10. Mod. 94.
287. 525.
12. Mod. 594.
Stra. 1020.

* [133]

E contra. The will confirmed no more than what was granted by the deed, which was nothing at all; it was barely a covenant to levy a fine to such uses, which cannot operate to raise any estate without it is actually levied. The words in this case are doubtful, and the intention of the testator does not plainly appear so far as to disinherit his heir, who is always favoured by the law. A devise of all his "mortgages" to *Robert Key*, whom he made executor, was held a good devise of the lands in mortgage (c); but in the same book it is held (d), that by a devise of "all his" "estate, mortgages, &c. whereof he was possessed, &c." no fee passed in the lands mortgaged, because the heir shall not be disinherited without apparent intention of the testator (e), manifested by express and plain words in the will.

But without further argument judgment was given for the plaintiff.

(a) Bro. Abr. title "Devise," placito 45

(b) Cro. Jac. 145.

(c) *Cripps v. Gryll*, Cro. Car. 37.

(d) *Wilkinson v. Maryland*, Cro. Car. 447. S. C. Cro. Car. 449; and in 2. Show. 395. this case, as reported

by Croke, is said to agree exactly with the roll.

(e) An heir at law cannot be disinherited by the plainest intention apparent in the face of a will, unless the estate is completely disposed of to somebody else. *Den v. Gaskin*, Cowp. 661.

Case 45.

Mason against Hanson.

A declaration by an administrator, that administration was committed to him by *A. B.* peculiar of *C.* in the cathedral of *D.* is good after verdict, without shewing the authority of *A. B.* to grant it.

DEBT FOR RENT, by an administrator, due in the life-time of the intestate. Upon *nil debet* pleaded they were at issue, and the plaintiff had a verdict.

It was moved in arrest of judgment, that the plaintiff had made out no title; for he had set forth, that administration was committed to him by the official, "*reverendi viri JOHANNIS HALL, præbendarii præbendi et peculiaris jurisdiction. de BRAMPTON, in ecclesiâ cathedrali de LINCOLN,*" and does not say that it did belong to him to grant administration, &c. This official is neither bishop, ordinary, or archdeacon; and therefore it shall not be

S. C. 1. Show. 355. 8. Mod. 244. 356. 380. 10. Mod. 21. 11. Mod. 223. 12. Mod. 100. 385. 443. 537. 616. Stra. 781. 2. Barnes, 142. 1. Peer. Wms. 753. 3. Peer. Wms. 349. 370. Fitzg. 174. 3. Bac. Abr. 442. Dougl. 4.

intended

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intended that he had an authority, if not shewed by the plaintiff; it is otherwise in case of a defendant (a). This is in a peculiar jurisdiction, and therefore in intitling himself the plaintiff ought to say *cui administratio pertinet*, &c. and shew that he had a lawful power to grant it (b); for it shall not be presumed to be proved at the trial; he may have a peculiar jurisdiction to be exempt only from the visitation of the bishop, but not to grant administration.

MASON
against
HANSON.

Et contra. This might have been a good objection upon a demurrer, but it is cured by the verdict (c). Since the statute of 17. Car. 2. c. 8. and before the making that statute, it has been held, that in an action brought by an administrator, omitting *proferat hic in curia literas administrationis* (d) was good after verdict.

So the judgment in this case was affirmed.

(a) Morgan v. Williams, Cro. Eliz. 431. ; Temple v. Temple, Cro. Eliz. 791. ; Skidmore v. Winston, Cro. Eliz. 879. ; Marshal v. Ledham, Stiles, 282. ; Petto v. Ruddock, 1. Sid. 228.

(b) Mayhew v. Flower, 1. Sid. 98. ; Slow v. Wilmot, 2. Saund. 402.

(c) And now by 4. Ann. c. 16. which extends the 16. & 17. Car. 2. c. 8. to judgments upon confession, *nihil dicit*, or *non sum informatus*, it is enacted, 442.

(d) See 1. Ld. Ray. 562. 2. Ld. Ray. 856. 1037. 1071. 5. Corn. Dig. "Pleader" (2. D. 10.). 2. Bac. Abr. 442.

* [134]
Case 46.

* Hele against the Bishop of Exeter and Others.

QUARE IMPEDIT. The plaintiff, *Sampson Hele*, declared, that he was seised of the manor of *Southpole*, in the county of *Devon*, in fee, to which the advowson of the church there did belong; and that, being so seised, he presented, &c.; that his presentee was afterwards admitted and inducted; that the church became void by his death; and that now it belonged to him to present, but was hindered by the bishop and his collatee, &c.

A plea by the bishop to *quare impedit* for refusing the patron's presentee, stating *quod fuit minus sufficiens in literaturâ et ed ratione inhabilis*, is good, although it do not state any particular facts of insufficiency, or shew any certain cause of refusal.

The bishop pleaded in bar, *viz.* that the church was within his diocese; that he claimed nothing but as ordinary; that it was a benefice with cure, &c.; that the church became void by the death of the last incumbent, &c.; that the plaintiff did present to him *Francis Hodder* within six months after the vacancy, as his clerk, *qui quidem FRANCISCUS HODDER fuit persona in literaturâ minus sufficiens, seu capax ad habendum d' eam ecclesiam*, &c.; S. C. Comb. 239. that the bishop did examine him, as he lawfully might, and upon his examination found him to be *in literaturâ minus sufficiens, ac eâ ratione fore personam inhabilem et minime idoneam ad habendum* S. C. 3. Lev. 311. S. C. 2. Salk. 539. S. C. 2. Lutw. 1094. S. C. N. Lutw. 348. S. C. Holt, 609. S. C. Show. P. C. 88. 2. Inst. 632. 5. Co. 58. March, 11. 3. Leon. 209. Cro. Eliz. 241. Ld. Ray. 450. 948.

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FILE
against
THE BISHOP OF
EXETER
AND OTHERS.

beneficium cum curâ animarum; for which reason the bishop did refuse to admit him, and gave notice thereof to the plaintiff within six months after the said refusal, that he might present another, &c.; that the plaintiff did not present within the six months, by reason whereof it belonged to the bishop to collate, &c. who thereupon did collate the other defendant, who was instituted, &c. *Et hoc paratus est verificare, &c.*

The incumbent pleaded the same plea,

The plaintiff replied, that *Hodder* was vicar of the church of *Uxerburgh*, in the county aforesaid, at the time of his presentation to *Southpole*; that he was *homo literatus*, and in priest's orders, and was licensed to preach the word of God by the late *Bishop of Exeter*; had celebrated divine service many years; and was *satis et sufficienter literatus* to celebrate the same, &c.

There was a rejoinder and sur-rejoinder much to the same effect with the plea and replication; and upon a demurrer to the sur-rejoinder, the question in the common pleas was; and afterwards in the court of king's bench, upon the pleading.

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• For it was admitted by both courts, that the ordinary in this case was not a minister, but a judge constituted by the law of the land; and that it was proper to his office as judge to examine persons presented to him by patrons, &c.; and, if he found them defective in learning, that he may refuse to admit them; that it was against sense and reason, and against a plain and positive law, to object, that because this person has been ordained by a former bishop, and admitted to another curacy, that therefore he shall be presumed to have a sufficiency of learning, and that his former examination and admission shall be an *estoppel* (as it was said) against all succeeding bishops of that or any other diocese; for every ordinary is obliged, by the duty of his office, to judge for himself; and therefore it is plainly against common reason for him who is appointed to be a judge to say a man is sufficiently learned, because another person in the same office has thought him so. It is likewise against a positive law; for the statute of *Articuli Cleri*, 9. *Edw. 2. c. 13.* provides, "That if the bishop refuse to admit ecclesiastics *propter defectum scientiæ*, they shall not be examined by the laymen, for that is against the canons, but they shall go to an ecclesiastical judge, *cui de idoneitate personæ præsentatæ pertinet examinare.*" Now it is plain by these words the presentee must be *bona persona*, and that the bishop to whom he is presented is the judge of his ability.

20. Mod. 237.
433.

But in the common pleas the chief objections were to the pleading; and therein it was considered,

FIRST, What learning was requisite to capacitate a man to have a living *cum curâ animarum*?

SECONDLY, Whether by the plea it was sufficiently shewed that *Hodder* the presentee was incapable.

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As to THE FIRST POINT, an ordinary sufficiency in learning is enough to entitle a man to preach, for otherwise in many parishes there would be no preaching; and that to understand the *Latin* tongue was not an absolute qualification to reading and praying, since both the scripture and liturgy are now in *English*. It is true, as to preaching it is required by a particular law (a) to understand the *Latin* tongue, viz. to be able to answer and render to the ordinary an account of his faith * in *Latin*, otherwise not to be admitted to preach; and since that is allowed by the law to be a sufficient qualification, the defendant ought in his plea to have pursued the statute, by shewing that the presentee could not render an account of his faith in *Latin*. But be it how it will, *minus sufficiens in literaturâ* can be no good plea, because of the uncertainty.

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SECONDLY, Therefore the defendant ought to have set forth in what learning this *Hodder* was defective, that this Court might judge whether it was a good cause of refusal by the bishop.— It is a rule in law, that all pleas which go to the disability of a person ought to be certain (b); and therefore a plea of excommunication, *propter contumaciam in non comparenda*, being lawfully cited, has been adjudged naught, because it does not shew any special cause, that the Judges of the common law may see whether the spiritual court had cognizance of the original cause. So in an action brought by a *villein*, formerly it was not enough for the lord to plead that he was his *villein*, but he must shew how, viz. *quod præd. A. est villanus ipsius B. spectans ad manerium suum de R. &c.* (c). But, for an authority in point, *Specott's Case* (d) was relied on, where the bishop pleaded, that the presentee was *schismaticus inveteratus*, and the plea was held ill, because he ought to shew the particular schism; for though he is appointed judge *de idoneitate personæ*, yet because it is to justify his own act to the prejudice of another, which act is of record, therefore such general allegation is not good. It is no objection to say, that the temporal courts cannot determine what is schism; for let the cause of refusal be what it will, it must be directly set forth and alledged: if it be spiritual, the party may deny it, and then the Court must write to the metropolitan to certify the cause, whether just or not; if it be temporal, then he may traverse it, and the issue taken upon the traverse shall be tried by a jury. In common actions on the case the law requires certainty, and an ejectment *de uno messuagio sive tenemento* (e), or *de uno messuagio sive repository* (f), was held ill, because of the uncertainty in the one case, and because of the various signification of the word *repository* in the other case (g).

Ld. Ray. 853.
8. Mod. 43.
12. Mod. 125.
517. 520.

Ld. Ray. 197.
277. 1470.
1. Barnes, 117.
2. Barnes, 150.
Stra. 54. 71.
695. 834.
1063. 1084.

(a) 13. Eliz. c. 12.

(b) 8. Co. 28.

(c) Litt. sect. 195. Raft. Ent. 686.

(d) 5. Co. 57. 3. Leon. 198. 1. And.

(e) Cro. Eliz. 186.

(f) 1. Sid. 295.

(g) March, 96.

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AND OTHERS.

* Many more instances may be given of this nature (a); the books are full of them: as, if *detinue of charters* be pleaded in dower, it is not good without shewing the certainty of the writings, or that they were in a chest, &c. So where a man undertook to bring a sufficient man to be bail, &c. it is not enough to plead that he brought a sufficient man, but he must shew *quomodo sufficiens*. And if the law require so much certainty in these cases, *à fortiori* it is required in all pleas which go to the disability of a person in his profession. The word "*literatura*" is an ambiguous and equivocal expression; it signifies grammar learning, writing, reading, or any sort of learning: possibly the bishop might intend that *Hodder* did not write a good hand; he could not mean any such learning which was proper for his profession, because that must be particularly alledged to shew wherein the insufficiency did consist: but if issue had been taken upon this single word "*literatura*," the Court would have been misguided; for if he had been found insufficient in the mathematics or astrology (for those are *literaturæ*), he must have been refused.

E contra. FIRST it was premised, that no particular rules or measures were settled by the law to shew what learning was sufficient to qualify any man for a benefice; therefore a general allegation that he is *minus sufficiens in literaturâ* is enough to unqualify him for that purpose. And this would not be any means to exalt the power of THE ORDINARY, by giving him a latitude of refusal upon such a general instance of disability, and so to injure the patron in his right of presentation; for if the temporal courts should take upon them to judge in this matter, it is the same thing to the patron, because it is equal to him which of those is to declare the insufficiency of the person presented.—Therefore this pleading must be good,

FIRST, From the impossibility of pleading it otherwise;

SECONDLY, That it is certain enough.

* [138] FIRST, From the impossibility of pleading otherwise, for the nature of the thing will admit of no greater certainty. If the bishop should set down every particular defect in learning, * it would be impossible to join issue upon it, and then the plaintiff would have demurred, &c. If he should assign but one particular cause, that would likewise be insufficient, because one single act would not make a general inability, as those words "*minus sufficiens*" do import, and therefore "*inhabilis, &c.*" LEARNING is a thing which consists in many particulars, and the judgment which is to be made upon it may arise upon variety of questions and answers; the right of examination belongs to the bishop; and therefore if he find any defect in learning he may refuse the clerk, and plead, as he has done, "*minus sufficiens in literaturâ*," for he cannot plead otherwise. All other inabilities of a clergyman

(a) 1. Sid. 295. 3. Mod. 238. Barnes, 117. 8. Mod. 355. 2. Stra. 834. 2. Bac. Abr. 169.

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consist and do depend upon one single instance, as "bastardy," "excommunicated, &c.;" and therefore the true reason why, in all such cases, "*criminosus*" generally is not a good plea, is, because if any one of those single instances be distinctly alledged, and well proved, it would make the clerk *minimè idoneus*, &c. But it would not be sufficient to say a man is unlearned, because he is defective in one single point of learning, or in any one art or science; this defect must arise from a general inability, and consists in many particulars impracticable to be enumerated in a plea, and not to be proved by one single instance.

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SECONDLY, The certainty of this is to be considered in relation to the method of the trial, and the matter to be put in issue. And as to that, greater latitude has always been allowed in the trial of spiritual causes than in those tried in the temporal courts; therefore those who argued against the plea in *Specott's Case*, said, that "*criminosus*" and "*perjurus*" were not good without shewing the particular cause wherein, &c. which the LORD ANDERSON held to be true, but took this difference, because those acts were triable at the common law, and matters which were issuable there ought to be particularly alledged: but where the action is once well commenced, and *literature*, which is the substance of the plea, comes in incidentally, though the trial is to be by ecclesiastics, yet the temporal courts shall proceed to give judgment upon their certificates (a). *The Bishop of Norwich's Case* (b) cannot with any reason be objected to this matter: it was in a *quære impedit*, where he pleaded, that all the while he had been bishop, &c. the presenlee was a common haunter of taverns and of * unlawful games, *ob quod et diversa consimilia crimina* he was *criminosus*, &c. It is true, this was held an ill plea, but not from the uncertainty of it; it was because the matters of which he was accused were not evil in themselves, but were offences only prohibited by particular laws, and so no just cause of his refusal. The only case which can be objected with any colour is *Specott's Case* (c), where it was held, that the bishop ought to shew the particular schism, &c. But this plea may be distinguished from that judgment several ways. FIRST, Because in that case there was a possibility to set out the particular schism; but the insufficiency of learning cannot be set forth, because, as has been said, it depends upon such variety of questions and answers, and does not consist in any particular thing, so as to work a general disability. If one single instance had been sufficient for that purpose, the bishop might have returned this, *viz.* the act of Uniformity (d) having prohibited preaching without a licence from the ordinary, and enjoined the reading THE THIRTY-NINE ARTICLES in his presence, and declaring the persons assent thereunto; it was done thus: "*Ego subscribo ad tricena novena articulorum fiderum.*" In THE NEXT PLACE,

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(a) Hob. 296.

(c) 5. Co. 57.

(b) Dyces, 254. 2. Roll. Abr. 355.

(d) 13. & 14. Car. 2. c. 4.

the

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the statute of *Articuli Cleri* provides, "That persons who are spiritual shall not be under examination of laymen, if the bishop should refuse them for want of learning or other reasonable cause." Now *schism* comes under that general clause, which may be one reason why it ought to be particularly set forth, because it is traversable; but the sufficiency of *learning* cannot be traversed, it is only inducing to the disability of the clerk. And then, LASTLY, the plea in bar in *Specott's Case* (a) was in the affirmative; therefore it ought to have been set forth wherein he was a schismatic; but in this case it is in the negative, and so the defendant need not shew wherein the clerk was unlearned (b).

* [140]

If a patron's clerk be refused for inability, the ordinary must give notice of the refusal to the patron.

- 1. Inst. 632.
- Dyer, 327.
- Cro. Eliz. 119.
- 3. Leon. 32.
- 1. Salk. 539.
- 3. Com. Dig.
- "Esgliffe" (1).

- 2. Peer. Wms. 405.
- Comy. 358.

ANOTHER QUESTION was raised, viz. Whether *Held* the patron had sufficient notice in this case to present his clerk? And it was said he had not, because the six months shall commence from the time of notice of the refusal, and the bishop had collated within that time, so that till such notice * was given the bishop was a disturber; and therefore in the pleadings the notice is generally alledged to be the same day with the refusal: but however there ought to be a convenient time.

But it was answered, and so is the law, that in case of refusal for inability the six months shall commence from the time of the death of the last incumbent (c), because the patron ought to present a clerk that is qualified, otherwise his presentation is void, and shall not prevent the lapse. * It is true, it has been the opinion of this Court that notice of the refusal ought to be given to the patron "immediately when he was presented and examined, or within convenient speed as may be." Those are the words of the book (d); but it is to be observed, that it was in a particular case, where the patron did not present until sixteen days within the six months after the avoidance; so that the time expiring, the bishop refused the clerk, but gave no notice to the patron till three days after the months were expired, and then collated. Now this was held (and with good reason) too long a time for the bishop to delay the notice; it was purely a design to prevent the patron of his presentation: for if he had given notice before the six months had been expired, the patron might have presented another

(a) 5. Co. 57.

(b) See *Manter's Case*, 2. Co. 3. b.

(c) *Degg's Parsons Law*, 8. Dyer, 327. *Keilw.* 50. *Show. C. P.* 103. *Bendloe*, pl. 136. 3. Leon. 46. 2. Roll. Abr. 364.—So also if the church becomes void by acceptance of a plurality against 21. *How. 8. c.* 13. *Dyer*, 237. *Cro. Car.* 357. 2. Will.

174. 3. Burr. 1504.; or by certificate of the bishop for non-payment of tithes according to the 26. *How. 8. c.* 3. *Dalison*, 59.; or by cession, *Jones*, 337.—See 13. *How. c.* 12. and 3. Com. Dig. "Esgliffe" (H. 9.).

(d) *Albany v. Bishop of St. Asaph*, *Cro. Eliz.* 119. 1. Leon. 31.

qualified.

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qualified. Besides, in the case at bar the patron had four months time to present after notice, &c. (a).

But upon the uncertainty of the pleading JUDGMENT was given in the common pleas for the plaintiff, and affirmed upon error in the court of king's bench, but afterwards reversed in parliament.

THIS
against
THE BISHOP OF
HEREFORD
AND OTHERS,

(a) The court of common pleas were of opinion upon this point of the case, 2d. That the ordinary must examine in convenient time, and after that refuse in convenient time; and that if he do not, he is a disturber by his delay. 3dly, That if the ordinary refuse *quia criminatus*, he need not give notice of his refusal; for the crime is as much in the conscience of the patron as the bishop, and in that case the lapse shall incur from the avoidance. But if he refuse *quia illiteratus*, he must give personal notice, and the lapse shall incur from the refusal, 3. C. 2. Salk. 539. ; and in the king's bench, Holt, Chief Justice, was of opinion, that if the refusal be for any thing criminal, the six months run on without notice; but he said, there was some

doubt in case it was for want of learning, 3. C. Comb. 240. ; but none of these points were insisted on, either in the common pleas or in the king's bench, 3. C. Show. Cases in Parl. 102.—Lord Coke agrees with the law as laid down in the second point of this case, 2. Inst. 632. But Dr. Burn is of opinion, that notice ought to be given to the patron of the refusal, whatever the cause may be, 1. Burn's E. L. 142. ; and in the case of Rex v. Bishop of Hereford, Mich. Term, 7. Geo. 1. a plea by the bishop in a *quare impedit* that he claimed nothing but as ordinary, was holden bad, for want of alleging notice of refusal, though in a case where THE CROWN presented. Com. Rep. 358. 8vo edit. by Mr. Rose.

Bagnell against Abnett.

In the Common Pleas.

Case 47.

* [141]

IN A SPECIAL VERDICT in ejectment the case was thus :

John Herbert was seised in fee of the tenements in question, and had issue two daughters, Margaret, married to one Lander, and Elizabeth. Margaret had issue John and James, &c. ; and the said John Herbert, being so seised of the tenements aforesaid, called by the names of Upper and Lower House Tenements, one of which the jury found to be of the yearly value of thirty pounds, and * the other of forty pounds, devised them in these words : " I DEVISE all my messuages in Milwich, Corton, and Frasdale, to trustees, &c. (naming them), upon special trust for payment of debts, until my grandson John Lander attain the age of twenty-one years ; and from thenceforth I GIVE all my said messuages, lands, and tenements, in Milwich, Corton, and called A. for raising money ; the other third for another purpose, and then to his grandson, taking no notice of the land called B. ; yet the land called B. shall pass to the grandson ; for there being a sufficient description in the first part of the will, " all my lands," it shall not be controuled by the subsequent imperfect explanation.—Cro. Car. 129. 447. 473. 1. Roll. Abr. 613. J. nca, 379. Crp. Eliz. 123. 476. 658. 1. And. 160. 1. Leon. 57. Savil, 20. 1. Salk 134. 1. Perr. Wms, 226. 302. 12 Mod. 592. 2. Peer. Wms. 456. 3. Peer. Wms. 26. 61. 322. 1. Com. Dig. " Devise" (N. 2, and 3.) Ambler, 387. Cowp. 352.

If a man having lands called A. and B. devise all his lands to trustees for payment of debts, until his grandson attain the age of twenty-one years, " and " from thenceforth give all " the said lands " called A." as follows, viz. two parts of the lands called

" Frasdale,

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BAGWELL
against
ABNEY.

" *Prasdale*, as followeth ; *videlicet*, two parts of the *Nether House*
" *Tenement* (the whole in three to be divided) for the raising of
" two hundred pounds, &c. the remainder to *John Lander* and
" the heirs of his body, remainder to *James* and the heirs of his
" body, remainder to the right heirs of the devisor." The other
third part, after some trusts, &c. he devised to *John* and *James*,
ut supra, but did not mention the *Upper House Tenements*.—*John*
Herbert died, and *John Lander* also died without issue, &c. and
James the second son of *Margaret* was lessor of the plaintiff.

The question was, Whether the *videlicet*, and the clause which follows, shall relate only to restrain the devise to the *Nether House* alone ? or, Whether the whole estate is not by general words devised to the grandson ? for if not, it must come to the daughters.

The clause coming after the *viz.* does not restrain this devise to the *Nether House Tenements*, but upon the whole construction of the will both the tenements pass to the lessor of the plaintiff ; for the general words comprehend the whole estate, and the *viz.* is only directive how part of it shall go ; and if it be not thus expounded, it is repugnant.

E contra. The *Upper House Tenements* do not pass, for both are distinct parts of the testator's estate, and distinctly devised ; therefore it is against the rules of law that one should pass by the devise of the other, especially in this case, where the testator himself distinguished them by his will. Agreeable with this was a resolution in this court, *Hilary Term*, 11. *Car.* (a) : A man was seised of a *corner-house*, and another contiguous, in the occupation of several tenants, and devised the *corner-house*, reciting it to be in the occupation of the proper tenant, and of him who was likewise tenant to the other house ; now they would have that *other house* pass by that devise, because the tenant of it was named : but it was held that it should not, for nothing passed but what was particularly expressed, which was the *corner-house*, and that the mistaken
• [142] * addition of a wrong tenant should not make that void which was sufficiently made certain by the name of " a *corner-house*." Wherever any land is expressly devised, no implication, though ever so strong, shall carry it otherwise : as if a man have a farm called by a particular name, part whereof was let, and part used by the owner himself, who devised " all his farm (naming it), and the "lands thereunto belonging (in the tenure of his tenant), to his wife "for life, and that it and all the rest of his lands shall remain to R. "after the death of his wife (b) ;" these words shall not carry it by implication to the wife, because there was an express devise to her before of the other part. Many more proofs might be brought of

(a) *Wilkinson v. Maryland*, Cro. Car. 447. 1. Roll. Abr. 614. Jones, 2. Leon. 225. 3. Leon. 130. Moor, 379.
(b) *Higham v. Baker*, Cro. Eliz. 15. 123.

this

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this nature ; the books are full of them, both modern and ancient. (a), viz. as where a man having lands in a vill, and in two hamlets in the same vill, devised all his lands in the vill, and in one hamlet, by particular name ; it was held, that no more passed than what was expressed, and that the lands in the upper hamlet did not pass. But the case which comes nearest to this in question is, where the testator had a farm which extended to two vills, which farm was called *Heylands*, and the devise was of "all his land (in one vill, naming it) called *Heylands*, &c." nothing passed but what was in that vill (b) ; and the reason given was, because nothing more shall be intended than what was expressed by the testator. There is yet a stronger case than this at bar ; it was (c), A man had a house in *Oxfordshire*, and house and lands in *Hertfordshire* ; and the will was, "I BEQUEATH all that my house in *L.* in "*Oxfordshire*, with all other my lands, meadows, and pastures, &c. " in *Watford*, in the county of *Hertford*, &c. ;" now it was adjudged, that the house in *Watford* did not pass, because it was in a will, which must be construed according to the express words and intent of the deviser ; if it had been in a grant, then the house would have passed as well as the lands ; for every man's grant must be taken in the strongest sense against the grantor himself.

BACHES
against
ARNETT.

And of this opinion was THE COURT in the principal case, viz. *Ld. Ray. 819*, that the adverb *videlicet* was distributive here, and shewed what the devisee should have. 1271.

So the plaintiff had judgment *nisi* (d).

(a) *Dyer*, 261.

(c) 2. *And.* 123.

(b) *Wooden v. Osbourne*, *Cro. Eliz.*

(d) But see 3. *Com. Dig.* "Devise"
(N. 2.).

* *Whittingham against Andrews.*

* [143]
Case 48.

ERROR OF A JUDGMENT in *ejectment* in the county palatine of *Durham*. The declaration was, "*de mineris carbonum* in "*GATESIDE*."

An *ejectment* "*de mineris carbonum* in *Gateside*" is good, without shewing how many ; for by *mines* of coal in a certain district the number is understood by the practice and usage of the coal countries.

It was objected, that this was very uncertain, for the plaintiff should have named how many *mines*, because in that county several men have many mines in one place. This is as uncertain as an *ejectment* of "three acres of meadow and pasture," not shewing how much of either (a). So an *ejectment* of "a messuage and ten acres of land, twenty of pasture, and twenty of meadow, "*per nomen* of a messuage and ten acres of meadow more or less : " now the words "more or less" could never be intended to extend to forty acres more, there being only ten acres demised ; and for

S. C. 2. *Show.* 364.
Stiles, 293. 292.
2. *Bac. Abr.*

S. C. *Salk.* 255. S. C. *Comb.* 201. S. C. *Carth.* 277. 2. *Roll. Rep.* 166. *Yelv.* 118. *Cro. Jac.* 150. *Noy*, 121. 5. *Com. Dig.* "Pleader" (2. Z. 2.). 166. *Ld. Ray.* 191. 277. 789. *Str.* 1063. 1084.

(a) *Cro. Car.* 572. *Ante*, 97.

this

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WRITING. this uncertainty a judgment was reversed (*a*). It will not lie of *a close*, but it must be of a certain number of acres, and the number of the acres must be particularly set forth; and this was *Savill's Case* (*b*).

**HAM
against
ANDREWS.**

E contra. No greater certainty is required than that the sheriff may know of what to deliver possession, which is done here; for the words "*de mineris carbonum*" ascertain the nature of the thing in demand (*c*). It is true, an ejectment *de omnibus et omnimodis decimis* is not good, because of the uncertainty of what nature the tithes are; but if the word "*facti*" or "*lanæ*" be added, it is well enough, because the nature of it is then made certain (*d*). This action is in the nature of trespass, because of the damages which are to be recovered; and one may bring an action of trespass for "a piece of land," without any other certainty (*e*). It cannot be denied but that many judgments have been reversed for the uncertainty of the demand; but this case was not so uncertain that execution could not be had of the judgment. The exception is, that it is "*de mineris carbonum*;" if it had been "*de minerâ*," that is admitted to be certain enough. Now the nature of the thing will admit of no other certainty, for a mine of coals runs through many lands; and though it is but one mine, yet when it is opened, they usually * make several shafts to let in the air; and if the plaintiff had declared but for "one mine," he could have recovered but "one shaft." It is usage must support this ejectment: if it is brought "of fifty acres in Ireland," though such a declaration would be uncertain here (*f*), yet this Court would not reverse a judgment given there without writing thither to know the usage.

♦ [144]

And of this opinion was THE COURT, that it may be good by custom of the country; and therefore the judgment was affirmed.

- (*a*) *Yelv.* 166. — See 2. *Bac. Abr.* 170. (*e*) *Owen*, 19. *Cro. Eliz.* 584.
 (*b*) *Hammond v. Savile*, 1. *Roll. Moor*, pl. 587. and pl. 976. *Run.*
Rep. 55. 11. *Co.* 55. *Eject.* 27. *contra.*
 (*c*) 2. *Ld. Ray.* 1470. 1. *Burr.* (*f*) *Cro. Car.* 512. *Str.* 71. 1063.
 629. 5. *Burr.* 2673. 1084. 1. *Burr.* 613.
 (*d*) 11. *Co.* 25. 1. *Roll. Rep.* 68.

Case 49.

The King and Queen against Marriot.

It is a statute create a new offence, and prescribe a particular mode of punishment, that mode of punishment alone must be pursued, and not the common law method by indictment. — S. C. *Carth.* 263. S. C. 1. *Show.* 398. *Palm.* 388. 2. *Roll. Rep.* 398. 1. *Salk.* 460. *Comb.* 405. 2. *Burr.* 799. *Str.* 479. 828. 4. *Corn. Dig.* "Indictment" (E). *Ld. Ray.* 1303. 991. 3. *Bac. Abr.* 97. 505. *Fitzg.* 47. 65. 1. *Hawk. P. C.* chap. 78.

BY the statute of 5. & 6. *Edw.* 6. c. 25. it is enacted, "That
 " no person shall keep an ale-house but such who shall be
 " admitted thereunto, and allowed in open sessions of the peace,
 " or else by two justices of the peace, *quorum unus*, &c. under the
 " penalty of three days imprisonment without bail, and not to be
 " discharged without giving a recognizance with two sureties to
 " do so no more."

The

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The defendant was indicted for keeping of an alehouse without a licence.

THE KING
AND QUEEN
against
MARRIOT.

It was objected, that it would not lie, because it is not an offence at the common law, but was made so by this statute, which gives power to "the justices of peace in their sessions to make enquiry into these offences by presentment, information, or otherwise, &c." But an *indictment* is another sort of punishment, which is not provided for by this or any other statute. Now where a law makes an offence, and appoints the method of prosecution, it must be punished according to such method, and not otherwise (a). This was the opinion of the Court in *Castle's Case* (b), who was indicted upon the statute of 8. Hen. 6. c. 11. for taking upon him the office of a justice of the peace, not having twenty pounds a-year, and sending out a warrant by virtue of his commission; the penalty appointed by the statute is "twenty pounds, a moiety to the king, and the other to the informer, to be recovered by *action of debt* at the common law," and therefore the offender cannot be indicted.

E contra. The party may proceed by way of indictment, though it is in a case where a new offence is created by a particular law; and where the penalty is directed to be recovered by bill, plaint, or information; for those are affirmative words, and shall not take away the general method of proceeding according to the course of the common law. The thing prohibited is of public concernment (c), and an indictment will lie against the offender, if there are no negative words to restrain that way of proceeding.

* [145]

THE CHIEF JUSTICE. An *indictment* being a summary way of proceeding, is more beneficial for the subject; and therefore it seems reasonable that such a method should be pursued. To convey a maid from her parents under the age of sixteen years is no offence at the common law, it is made so by a particular statute (d); and authority is given to the STAR-CHAMBER by *information*, and to the justices of assize by *indictment*, to determine the offence; but yet the court of king's bench is not excluded; and so it has been constantly held since the making of the law. It is prohibited by the statute of 22. Car. 2. c. 12. to travel with more than five horses at length: this is a *new law* and a *new offence*; and yet it was held, that an indictment would lie in the court of king's bench against the offender, though a particular punishment is directed by that statute.

4. Com. Dig.
"Indictment"
(D).

(a) 7. Co. 36.

(b) Cro. Jac. 643. 2. Roll. Rep. 247.

(c) 1. Mod. 36.

(d) By 4. & 5. Phil. & Mary, c. 8. for which see 1. Hawk. P. C. ch. 42. But by THE COURT, in the case of Rex v. Moor, this is an offence at common law, for it is *malum in se*, 2. Mod.

130.; and so adjudged in Rex v. Twiston, 1. Lev. 257. 1. Sid. 387.; and in Rex v. Lord Ossoulton, 2. Stra. 1107.—See also Rex v. Pigott, 12. Mod. 516. Holt, 758.; Rex v. Thorpe, Com. Rep. 27. S. C. 5. Mod. 221. and Cases Temp. Talb. 58. 1. Peer. Wms. 696, 705. 2. Peer. Wms. 111, 561. 3. Peer. Wms. 116, 118.

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THE KING
AND QUEEN
against
MARRIOT.

BUT DOLBEN and EYRE, *Justices*, were of a different opinion : they never heard of an indictment before for keeping an unlicensed alehouse ; and this seems to be the judgment of the parliament in the statute 3. *Car.* 1. c. 3. that an indictment would not lie, because the conviction is to be upon view by the chief officer within his limits, or by confession of the party, or by oath of two witnesses ; and then the penalty is to be levied by distress, &c. (a).

(a) The Court, it seems, took time to consider of this case, S. C. 1. Show. 400. ; and in the Hilary Term following the indictment was quashed, S. C. Carth. 263. In the case of Stephens v. Watson, Mich. Term, 13. *Will.* 3. it is said, that keeping an alehouse without licence is not an indictable offence, because the statute 5. & 6. *Edw.* 6. c. 25. which makes it an offence, has made it punishable in another manner, 1. Salk. 45. See 26. *Geo.* 2. c. 31. f. 9. and 10. 1. Hawk. P. C. ch. 78. And this is confirmed by the case of Rex v. Penfax, 1. Bar. K. B. 127. 2. Seff. Cases, 172. ; and Rex v. Wright, 1. Burr. 544. ; for wherever a new offence is created by statute, and a special jurisdiction out of the course of the common law is prescribed, that special jurisdiction must be strictly followed, or all the proceedings will be a nullity, Hartley v. Hooker, Cowp. 524. If, however, new-created offences are only prohibited by a *general prohibitory clause* in the statute which creates them, or if there is a *substantive prohibitory clause*, and also a *particular provision* and a *particular remedy*, there an indictment will lie, Rex v. Wright, 1. Burr. 544. ; and if the offence for the punishment of which a particular remedy is appointed be a *common-law offence*, there either the method by *indictment* or the *particular*

remedy may be pursued ; for the sanction, in such case, is *cumulative*, Rex v. Robinson, 2. Burr. 803. ; and therefore if a statute direct an act to be done, without pointing out any mode of punishment, the mode of proceeding by *indictment* at common law for disobeying the injunction of the Legislature, is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience, Rex v. Davis, Sayer Rep. 133. ; Dougl. 441. 446. ; Rex v. Boyal, 2. Burr. 832. ; 1. Bott's Poor Laws, Mr. Const's edit. 300. ; Rex v. Balme, Cowp. 648. ; for the court of king's bench cannot be ousted of its common-law jurisdiction without *negative words* or *necessary implication*, Cates, *Qui Tam*, v. Knight, 3. Term Rep. 442. Therefore where a *new offence* is created by a statute, and a penalty annexed to it by a *separate and substantive clause*, it is not necessary for the prosecutor to sue for the penalty, but he may *indict* on the prior clause, as for a *misdemeanor* in disobeying the directions of the Legislature, Rex v. Harris, 4. Term Rep. 202. ; for wherever a statute forbids the doing of a thing, the doing it *wilfully*, although without any *corrupt motive*, is indictable, Rex v. Sainsbury, 4. Term Rep. 451.

Case 50.

White against England.

A declaration on 5. *Eliz.* c. 4. is good, although it do not state that the trade was used in England at the time the statute was made.

BY the statute of 5. *Eliz.* c. 4. it is enacted, " That none which hath not served an apprenticeship seven years in any art or mystery then used shall use the same, &c. upon pain to forfeit forty shillings a-month."

An action of debt was brought upon this statute against the defendant for using the trade of a *tiler*, not having served an apprenticeship for seven years.

8. C. 3. Salk. 42. Cirth. 163.
10. Mod. 148.
336.
11. Mod. 63. 167. 12. Mod. 251. *Ld.* Ray. 513. 1034. *Stra.* 552. 2. Wils. 168.
1. Bl. Rep. 233. 6. Com. Dig. " Trade" (D. 5.).

The defendant pleaded, that his father was a freeman of London, and that he was his eldest son, and that *jure patrimonii* he might use that trade.

Upon

* Upon a demurrer to this plea THE COUNSEL did not rely upon it, but took exceptions to the declaration, because it is not shewed that the trade of a *tiler* was an art or mystery used in *England* at the time of the making of the statute.

WHITE
against
ENGLAND,

To which it was answered, that it was a trade mentioned in the statute, and so by consequence must be then used (a).

But the plaintiff was advised to waive his demurrer, which he did, and paid costs.

(a) *Per* Comb. 288. Gilb. Cases, 242. 2. Show. 210. 1. Burr. 367. 3. Bac. Abr. 552. 555.

Howard against Tremain.

Cafe 51.

ON the sixth day of *June* 1681 a bill was exhibited in chancery, and a commission prayed to examine witnesses *in perpetuum rei memoriam*. In *Trinity Term* following the defendant had a commission to answer, and the plaintiff examined his witnesses *de bene esse*, but no answer came in till two years afterwards, in which time two of the witnesses died.

On a bill to perpetuate the testimony of witnesses, depositions taken *de bene esse* after a commission to answer, and the defendant is in contempt, though before any answer comes in, may, on the death of two of the witnesses examined, be read in evidence on a trial after the answer is put in.

The question now was, Whether these depositions could be read in evidence at a trial at bar?

It was said, that it was the usual practice in chancery to examine witnesses *de bene esse*, and that if they died before they were examined in chief their evidence is good; for if such evidence should not be allowed at law, it would be a means to enlarge the jurisdiction of that court, and the party grieved would have a new equity. Nothing is more necessary than that the examination of witnesses should be in the proper court where the cause is depending; and this is the means to do it, *viz.* to examine them *de bene esse*: if the defendant should be obstinate, and refuse to answer, he may stand out in contempt of the court, and so prevent the plaintiff from perpetuating his evidence; and this is no inconvenience to the defendant, otherwise than by punishing his person by imprisonment; for after his answer comes in, he has the same advantage in every respect as he had before he was in contempt. It is no objection to say, that issue was not joined in chancery, because where depositions taken in that court are given in evidence at law, there is no proof but of bill and answer filed in the cause. * And therefore in the case of *Ford v. Gay* depositions, though exemplified, were refused by POLLEXFEN, Chief Justice, to be given in evidence, because there was no proof of an answer.

* [147]

S. C. 1. Salk. 278.
S. C. 1. Show. 363.
S. C. Carth. 265.
1. Keb. 685.
2. Keb. 31.
Ld. Ray. 220.
311. 729. 734.
893. 936. 1166.
1292.
1. Vern. 423.
452.
2. Vern. 197.
409.

Prec. Chan. 212. 8. Mod. 181. 10. Mod. 15. 11. Mod. 210. 12. Mod. 136. 251. 305. 379. 414. 607. Gilb. Eq. Rep. 16, 17. Fitzg. 197. 1. Peer. Wms. 288. 414. 567. 2. Peer. Wms. 162. 563. (646). 3. Peer. Wms. 195. Stra. 920. Chan. Caf. 175. 5. Mod. 211. 1. Atk. 445. 2. Show. 363. 2. Stra. 910. Bull. N. P. 235. 4. Com. Dig. "Evidence" (C. 4.).

Trinity Term, 4. William & Mary, In B. R.

HOWARD
against
TAMMAIN.

E contra. There can be no examination of witnesses upon a bill alone, and the fault is in the plaintiff, for not compelling the defendant to put in his answer in two years after the bill filed. Now when his answer was filed, those depositions which were taken *de bene esse* are of no use; for suppose a bill is brought against husband and wife for something which the man claims in right of his wife, and witnesses are examined *de bene esse*, and then the husband puts in his answer, this shall not prejudice the wife without her answer. This court will not allow depositions taken before commissioners of bankrupts to be given in evidence here, nor depositions taken in the ecclesiastical courts, and yet those courts have the king's authority to examine witnesses.

CURIA. Nothing can make it evidence but the necessity of the thing. It is true, in cases of wills it may be necessary to examine witnesses to perpetuate their testimony, but in this case the plaintiff was nonsuited upon evidence *viva voce*, and afterwards exhibited a bill, and obtained these depositions upon examination of his own witnesses, which is but paper-evidence at the best, and therefore they inclined not to allow it. *Tamen quare (a).*

(a) These depositions, by the opinion of THE WHOLE COURT, were allowed to be given in evidence; which was done accordingly. NOTE to former Edition; and with this S. C. Carthew, 265. and S. C. 1. Salk. 278. agree. By the report of this case in *Shower*, GREGORY and EYRS, *Justices*, were clearly of opinion, that these depositions were good evidence; but HOLT, Chief Justice, and DOUBEN, Justice, doubted. It seems clear, that depositions taken in *perpetuum rei memoriam* cannot be given in evidence, unless there be an answer put in and produced, T. Raym. 335, 336; or even though

the witness, after examination by order of Court, die before the answer comes in, Brown's Case, Hardres, 315; unless the defendant appear to be in contempt, Bull. N. P. 240. In the report of this case Carth. 265. it is said that the plaintiff had not taken out any process of contempt; but it appears by S. C. 1. Salk. 278. that the defendant was in contempt; that the plaintiff thereupon had a commission to examine his witnesses; and that the defendant joined in the commission, and cross-examined some of the witnesses; and therefore S. C. 1. Show. 367. GREGORY, Justice, held them to be good evidence.

Case 52.

The King and Queen against Bullock.

A single justice had not power to commit under 33. Hen. 8. c. 6. in a summary way, unless the offender was brought before him *instante* upon view of the offence committed.

BY the statute of 33. Hen. 8. c. 6. it is enacted, "That none shall shoot, or keep in his house a cross-bow, hand-gun, &c. unless he hath lands to the value of one hundred pounds *per annum*, on pain to forfeit ten pounds for every offence; and that any person may carry the offender before the next justice of peace, who, upon due examination and proof, hath power to commit him till he pay the penalty: justices in sessions and stewards of leets have power to hear and determine these offences."

The defendant not having the hundred pounds a-year did shoot in a gun in the month of February, and, in the March following, was brought before a justice of the peace, and by him was convicted of this offence.

And

4. Com. Dig.
"Justices of
"Peace"
(B. 43).

* And now a motion was made to quash this conviction, because it was before a single justice, who had not power by the statute to proceed in a summary way, unless the party is brought before him *instantly* upon view of the offence committed, which was not done in this case.

THE KING
AND QUEEN
against
BULLOCK.

And therefore the prosecutor was ordered to shew cause why it should not be quashed.

Anonymous.

Case 53.

AN ORDER was made at a *mineral court* held at *Mendipp*, in the county of *Somerſet*, that the defendant should forfeit his mineral tools and goods, and be banished from *Mendipp-bills* for ever.

An inferior court cannot inflict a *forfeiture*, unless warranted by *statute* or *custom*.

This order being returned, it was moved to quash it.

Ld. Ray. 766.
836.

And THE COURT held it to be an order against law, and not to be supported but by some special custom.

Anonymous.

Case 54.

THERE was a libel in the spiritual court against the defendant for not paying of a rate towards the repair of a church, &c.

The occupier of land in a parish shall be rated to the repairs of the church, and not the landlord living out of the parish.

He suggested, that the lands were in the occupation of his tenant, and that he was not an inhabitant in the parish where this church was, &c.

And this WAS HELD a good suggestion; for it is contrary to law to charge the person with repairs who does not live in the parish; the tenant of the land should be charged, and not the owner. If a man take a lease of a stall in a market-town, where he uses once a-week to sell his wares, but lives in another parish, he shall not be charged towards the repairs of the church in that market-town.

2. Roll. Abr.
288, 289.
5. Co. 67.
2. Inst. 489.
Cro. Eliz. 659.
1. Salk. 164.
Ld. Ray. 39.
512.

Preced. Chan. 42. 8. Mod. 61. 10. Mod. 13. Comy. 534. Stra. 56. 77. 100. 525. 1071. 1114. 1148. 3. Com. Dig. "Eggle" (G. 2.). 3. Term Rep. 107.

MICHAELMAS TERM,

The Fourth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* Barker and Another against Lade.

* [149]
Case 55.

ERROR OF A JUDGMENT IN THE COMMON PLEAS in *replevin*, wherein the defendant *Barker* made confession as bailiff to *Nicholas Marsh, &c.* and set forth, that before the taking the cattle, one *Robert Lade* was seised in fee of the place *WHERE, &c.* who in consideration of one hundred pounds, &c. did by deed grant to *Nicholas Marsh*, grandfather to the avowant, a rent of eighty pounds *per annum* in fee, *exceun. de omni illo capitali messuagio sive tenemento cum pertinentiis in BARHAM et de omnibus terris et hereditamentis præd. messuagio spectan. tunc in occupatione præd. ROBERTI LADE unde præd. locus in quo &c. est, et præd. tempore quo, &c. fuit parcel. &c.* with a clause of distress: that by virtue thereof the said *Nicholas Marsh* became seised of the rent, who devised it to *Richard Marsh*, and his heirs, &c. who by deed, &c. *pro et in consideratione naturalis amoris et* " transferred to him the said rent, to have and to hold the same, to him and his heirs for ever; by " virtue whereof, and of the statute of *Uses*, he was seised of the place *WHERE, in his demesne as* " of fee, and for six years rent distrained, &c." and there is neither *attornment* nor *inrollment*; it cannot pass as a *grant at common law* nor as a *bargain and sale*, but being by operation of law a *tenant to stand seised*, it ought to have been so pleaded.—S. C. 2. Vent. 145. 149. 260. 266. S. C. 3. Lev. 291. Skin. 315. 1. Mod. 175. Cart. 137. 2. Lev. 9. 1. Vent. 137. 109. 2. Vent. 318. Skin. 315. 7. Co. 70. 2. Co. 24. Cro. Eliz. 394. Co. Lit. 303. Yelv. 135. 5. Com. Dig. "Pleader" (C. 37.). 4. Bac. Abr. 100.

K 4

affectionis

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BARKER
AND ANOTHER
against
LADE.

* [150]

affectionis quæ gessit prædicto NICHOLAO modo defend. filio suo et summæ quinque librarum, to be paid to the grantor yearly during his life, *dedit concessit assignavit et transposuit* to the defendant the said rent, to have and to hold to him and his heirs for ever, by virtue whereof, and of the statute for transferring of uses into possession, the defendant was seised in *dominio suo, ut de feodo, &c.*; and for six years rent, &c. distrained; and so *Marsh* * *in jure suo proprio bene advocat, et BARKER ut ballivus* of the said *Marsh bene cognovit*, the taking, &c. (a).

To this the plaintiff demurred, and the defendants joined in demurrer.

Anavotry must shew the locus in quo is parcel of the land charged.

2. Vent, 130.

THE FIRST OBJECTION to this pleading was, that the place WHERE, &c. was not plainly and sufficiently alledged to be charged with this rent at the time of the grant thereof made to *Nicholas Marsh* the grandfather; for it should have been shewed, that the place, &c. did belong to the said messuage, or that it was in the occupation of the grantor at the time of the grant, as well as *tempore quo, &c.* the distress was taken.

THE SECOND OBJECTION was, that this was pleaded as a grant at the common law by the words *concessit assignavit, &c.* without attornment (b) or enrollment (c), it being in consideration of money paid, &c. and for this reason the plea was not good.

And of this opinion was POLLEXFEN, Chief Justice.

But THE OTHER JUSTICES *contra*; for they held, that the consideration of the grant being as well for *natural affection* as for *money*, it would amount to a *covenant to stand seised, &c.* and might be pleaded without an enrollment.

Upon this judgment A WRIT OF ERROR was brought, and it was now argued, that admitting this deed did enure as a *covenant to stand seised, &c.* it ought not to have been pleaded by the words *dedit et concessit, &c.* but as it operates by law, *viz. concessit et agreeavit quod seifitus existet*. Many instances may be given to prove this matter: one jointenant makes a feoffment to the other; this cannot make a good deed at the common law (d); for he cannot make livery and seisin, because the other is jointly seised with him, yet this deed shall enure by way of confirmation, and must be so pleaded, and not literally as the deed is worded. So the word "*dimisit*" is not only applicable to an estate for life or years, but to an estate-tail or in fee, but then it must be pleaded as such. My LORD COKE, in his *Comment upon Littleton*, says (e), that "*dedi*" or "*concessi*" may amount to a grant, to a feoffment, to a gift, lease, release, confirmation, or surrender; and that it is in the election of the party to use it to which of these purposes is

Ld. Ray. 308.
341. 403. 422.
737. 763. 967.
1126. 1206.
1536.
Pierc. Ch. 124.
10. Mod. 301.
423. 444.

(a) See the pleadings in this case,
2. Vent. 145. to 148.
(b) See the statutes 4. & 5. Ann. c. 16.
and 11. Geo. 2. c. 19.

(c) See 27. Hen. 8. c. 10.
(d) Bro. Abr. "Confirmation" pl. 11.
Plowd. 156. b.
(e) Co. Lit. 301. b.

most

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most agreeable with his interest, and therefore he may plead it as either; which shews that the pleading must be as the deed enures * and operates, and not as the words are in the deed itself. And therefore if one jointenant plead, that the other *concessit* to him, &c. this plea is ill (a), because a *grant* is not a proper conveyance from one joint-tenant to another, it must be by *release*; but if a jury had found *quod concessit*, that being the saying of the *lay gents*, would have been helped by the Court, and adjudged to be *quod relaxavit* (b). If tenant for life grant his estate to him in reversion, this is a *surrender*, and it must be pleaded according to the operation it has in law (c).

And for this reason, chiefly, the judgment was reversed (d).

- (a) Chester v. Wilkins, 2. Saund. 96. out *attornment*; and the averment that
(b) 8. Mod. 240. Fitzg. 275. it operated by way of *covenant to stand*
3. Bac. Abr. 207. *seised*, did not help it; but it ought to
(c) Comb. 190. 4. Bac. Abr. 100. have been pleaded properly, that the
(d) The judgment was reversed, be- father did covenant to stand *seised*,
cause the conveyance from *Marsh* to his S. C. 2. Vent. 151. But see S. C.
son was pleaded by way of grant with- 3. Lev. 292.

BARKER
AND ANOTHER
against
L. D.

* [151]

8. Mod. 240.
Fitzg. 275.
3. Peer Wm.
210.

Carter against Firmin.

Cafe 56.

BY the statute 19. Car. 2. c. 8. for rebuilding the city of *London*, it is enacted, "that no building or house shall be erected within the limits of the city but such as shall be pursuant to the scantlings mentioned in the said act; and if any person shall do contrary, being convicted upon the oaths of two witnesses, then the house so built shall be deemed a common nuisance, &c." And it is further enacted, "that all differences arising between builders, concerning placing and stopping up lights, shall be heard and determined by the alderman of the ward; and if he is party or cannot determine it, then by the mayor and court of aldermen."

If a statute, made for rebuilding a city destroyed by fire, enact that no buildings shall be erected within the limits of the city but according to certain directions in the act, it only extends to buildings upon old foundations, and not to erections entirely new.

Mr. Carter was possessed of a house in *Three King-court*, in *Fenchurch-street*, and *Mr. Firmin* had a house contiguous; there was a party-wall set between both these houses by the city surveyor, and both built above twenty years since. And now *Mr. Carter* would build a stable upon a void piece of ground which was never built on before; upon which the other complained to the court of aldermen, who sent two surveyors, being city officers, to view this building; upon whose report that court hindered any farther building till the right of the thing should be determined.

Salk. 415.
Skin. 600.
6. Com. Dig.
"Prohibition"
(A. 1.) (F. 10.)

And now *Mr. Carter* moved for a *prohibition* to the court of aldermen, and by his counsel alledged, that they had no jurisdiction over this matter: for their houses were built twenty years since according to the rules prescribed by the act; that the authority of that court was limited to the builders of houses upon the foundations of those * which were destroyed by the fire, and did not extend to such persons who built upon new foundations:

* [152]

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CARTER
against
FIRMIN.

so that the houses being built, their jurisdiction was determined; it was temporary only, and shall not be continued afterwards.

And of this opinion was THE COURT, and therefore inclined to grant the motion.

Qⁿ. If there is a custom in London for regulating window-lights?

But at another day, this matter being stirred again, it was said by THE COURT, that there might be a custom in the city to regulate lights, and for the uniformity of buildings, but not to determine men's rights.

The office of SURVEYOR of the city of London is as ancient as the corporation.

This was said, because THE ATTORNEY GENERAL insisted that the city surveyors were officers as ancient as any records of the corporation; that their oath is in the *Book of Oaths*, which is likewise a very ancient book; that these officers have in all times past been appointed to make particular reports to the court of aldermen, to which the parties concerned have always complied; and that it would be very inconvenient if a prohibition should go contrary to such an ancient custom.

If the Court doubt whether a prohibition should go, they will order the party to declare.

Therefore IT WAS ORDERED, that the plaintiff should declare upon a prohibition; and that the defendant might (if he saw cause) plead this custom, that so the Court might be judicially apprized of the matter.

Cafe 57.

Carter *against* Calthorp.

Hilary Term, 3. Will. & Mary, Roll 308. or 506.

A declaration in an action on the case on a plaintiff in an inferior court for a nuisance, from such a day to the time of the plaintiff levied, *et adhuc existit*, is good, after verdict and entire damages.

ERROR to reverse a judgment given in the court of *Hull*, in an action on the case, where the plaintiff declared, that he was seised of a messuage, &c. and that the defendant built another near it, and continued the said building from such a day to the time of the levying of the plaint, by reason whereof he stopped up his light; *et adhuc obstupavit*.—There was judgment for the plaintiff, and entire damages given.

And now the error assigned was, that by reason of the words *adhuc obstupavit*, damages were given for something after the plaint levied.

S. C. g. Lev. 345.
S. C. i. Show. 366.
P. C. Carth. 261.

To which it was answered, that the word "*adhuc*" refers only to the time of bringing the plaint, and not to any thing which happens afterwards; it is to shew, that the defendant has not abated the nuisance: they are words only of form, and used in most declarations, * viz. *solvere contradixit et adhuc contradicit*, &c. and so are the pleadings in the *Entries* in this very case, viz. that the defendant built a new house, by reason whereof the great-

* [153]

1. Vent. 103.
135.
2. Lev. 176.
10. Mod. 273.
713. 905.

3. Lev. 246. 2. Jones, 87. 2. Saund. 170. Dyer, 250. 3. Mod. 103.
5. Com. Dig. "Pleader" (C. 15.). 2. Bac. Abr. 7. Ld. Ray. 122. 392. 576.

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est part of the plaintiff's house magna tenebritate obscurata fuit et adhuc existit.

CARTER
against
CALTROFF,

And for this reason the plaintiff had judgment (a).

(a) See the case of Hext v. Burton, 11. 246. Rastal's Ent. 206. 550 in the common pleas, in Mich. Term, Herne's Pleader, 140. 1. Saund, 87, 1. Jar. 2. Roll. 425. Coke's Entries, Cro. Eliz. 191.

Davis against Speed.

Case 58.

Hilary Term, 3. Will. & Mary, Roll 261.

SPECIAL VERDICT in ejectment for lands in the county of Southampton.

The case appeared to be thus:

A *feme sole*, being seised in fee of the lands now in question, afterwards married *William Horn*. The said *William Horn* and *Ann* his wife did, by deed indented, covenant to levy a fine thereof to *Jollop* and *Stanley*, and their heirs, &c. to the uses following, viz. "to the use of the heirs of the said *William Horn* lawfully begotten, or to be begotten upon the body of the said *Ann*, remainder to the right heirs of the husband." The fine was levied; they had issue one son, who died in the life-time of his father and mother without issue; then *Ann* died; and afterwards *William Horn* died without issue. *Frances Cockey*, who was the lessor of the plaintiff, was sister and heir of *William Horn*, and the sisters and co-heirs of *Ann* had conveyed their interest to the defendant *Speed*.

The question was, Whether the heirs of the wife should have this land?

The objection why the right heirs of the husband should not have it was, because there was no *particular estate* for life limited in this conveyance to support the contingent remainders, which are therefore void, and the old use remains to the heirs of the wife.

But it was argued in his behalf that this was a settlement by way of *use*, which, like a will, was to be construed according to the intent of the parties; and for this purpose the law would raise an estate for life in him by implication, which being united with that estate he * had by the settlement itself, would create an estate tail in him, and so the remainders would be good. And to prove this the case of *Pybus v. Mitford* (a) was cited, viz. *Mitford* being seised in fee, had issue *Robert* by a first venter, and *Ralph* and *Jane* by his second wife; he covenanted to stand seised, &c.

Ray. 83. Poph. 4. 1. Salk. 226. 5. Mod. 143. 10. Mod. 416. 12. Mod. 201. 1. Co. 130. 2. Roll. Abr. 415. 1. Co. 130. Moor, 720. Gilb. E. 2. 49. 4. Com. Dig. "Estate" (B. 14.). 6. Com. Dig. "Uses" (B. 2.) (K. 7.).

(a) 1. Mod. 160.

if husband and wife seised of lands in right of the wife, levy a fine to the use of the heirs of the husband, begotten, or to be begotten, on the body of the wife, with remainder to the right heirs of the husband; THE REMAINDER is void, for it is a *future use*, and there is no *particular estate* for life limited in the conveyance to support the contingent remainder.

S. C. Show. C. P. 104. S. C. Holt, 730. S. C. 2. Salk, 675. S. C. Skin. 351. S. C. 12. Mod. 38. Post, 259. Plowd. 25. Dyer, 140.

* [154] 2. Roll. Abr. 415. 1. Co. 130. Moor, 720. Gilb. E. 2. 49.

"to

DAVIS
against
SPED.

"to the use of his heirs males begotten on the body of *Jane*," reversion to his own right heirs; the father died, the eldest son entered, whose title the plaintiff had; and the question was, Whether any use did arise to the second son? Three Judges against the opinion of TWISDEN, *Justice*, held, that an estate for life did arise to *Mitford* by implication, because a limitation to the heirs of his body carries the use to himself in whom his heirs are all included, and the old estate in fee which was left in him is then qualified and turned into an estate tail. This was the opinion of my LORD COKE, in the case of *Lane v. Pannell (a)*, where he said, if a feoffment be made to the use of the heirs of the body, &c. it is an estate tail executed in him, because he has an estate for life by implication. It is not material to object, that a use cannot arise in this case by implication, because the husband has no estate but in right of his wife; for a use may arise as well to a stranger as to the feoffor, because they both joined in the deed as well as in the fine: besides, he has an estate for his own life as tenant by the courtesy, and whenever the husband has an estate in right of his wife, in pleading it is always said, that *seisit. fuer. in dominico suo ut de feodo, &c.* But if no estate for life arise immediately by implication, then this may be good by way of a springing or contingent use to the heirs of the husband, and that till that contingency shall happen by his death, the use must still remain in the woman and her heirs.

E contra, there must be a particular estate found out to support these remainders, or otherwise they are void, and the estate is as it was before the fine levied, which operates for the benefit of her who had the old estate in her before. If this had been a conveyance at the common law, there could have been no question made, because the freehold (if any) cannot be put in *abeyance*; and it is plain it is in *abeyance* here, because there can be no right heir of *William Horn* whilst he is living. It is true, this is a conveyance by way of *use*, which before the statute was considered only as a *trust*; but now * by uniting the possession to those uses, they are governed by the known rules of the common law; for a use is an estate, and must take place either in possession or *in futuro*, as it is limited; and therefore where a fine was levied to the use of *B.* for life (*b*) and afterwards to the use of the children of *C. procreatis*, this limitation shall extend to none of his children born afterwards, because no future use was limited to them. In this case, a use was intended to be raised *in presenti* to the heirs of *William Horn*; now they could not take as heirs during his life; therefore there being no person capable of taking, it must be void. If it was designed to operate *in futuro*, then there must be a particular estate somewhere to support the remainder till the contingency happens, which estate must be either expressed or implied. It is plain that here was no particular estate expressed; then if it should arise by implication, it cannot be in the husband,

27. H. 8.

* [155]

2. Peer. Wms.
645. 668,
Cases T. T. 6.
13. 19. 216.

(a) Co. Lit. 22. 1. Roll. Rep. 240. (b) Cro. Eliz. 334.

because

Michaelmas Term, 4. William & Mary, In B. R.

because there are no words which shew any such intent. But if an implied estate for life should arise by construction of law, it must be in the wife, and then she dying before her husband, that estate was determined before the remainder to his heirs could take place, and therefore shall never arise; neither could any estate remain in the feoffees; for by one branch of the statute the possession is given to the *cestui que use*; and by another branch all the right is taken out of the feoffees, and given to the *cestui que use*, so that nothing remains in them; and it would be a very absurd thing if it should: for if a feoffment be to the use of himself and his heirs till a third person pay one hundred pounds, and then that he will be seised to the use of that person and his heirs; now if any thing should remain in the feoffees before the payment of the one hundred pounds it must be a fee simple, and then there would be two fee simples of the same land; to avoid which the statute must be construed to take the whole estate out of them, and fix it upon the land, which by operation of the statute shall give the use to every person in his turn according to the limitation of the parties (a). And therefore it was agreed in *Chudleigh's Case* (b), that the statute does not transfer the possession to any use but such as is in being; because it cannot be executed to a bare possibility of an use, neither can it be limited against the known rules of the common law (c).

DAVID
against
SPEED.

* CURIA. This is a future use, and no particular estate to support it; and no such estate could arise until the wife died without issue, and so the remainder is void.

* [156]
Ld. Ray. 180.
290. 314. 495.
854.
Prec. Chan. 338.

And afterward in *Easter Term* judgment was given for the defendant *Speed* accordingly, that no estate shall arise by implication to the husband; such a thing was never thought on in a deed, nor in a will but of necessity.

There was a writ of error brought upon this judgment in parliament, but it was affirmed. Show. C.P. 104.

(a) 1. Leon. 258.
(b) 1. Co. i.

(c) See 2. Roll. Abr. 796. Cro. Eliz. 321.

Buckley and his Wife against Collier.

Case 59.

Michaelmas Term, 4. Will. & Mary. Roll. 20.

THE HUSBAND AND WIFE brought an action on the case for work done by the wife during the coverture.

An assumption by husband and wife, for work done by the wife

The question was, Whether they could join in this action?

during the coverture, is not good.—S. C. 1. Salk. 114. S. C. 3. Salk. 63. S. C. Carth. 251. 1. Sid. 25. 2. Sid. 128. Cro. Jac. 77. Ld. Ray. 224. 443. 1031. 1050. 1208. 8. Mod. 26. 200. 341. 10. Mod. 64. 162. 205. 245. 264. 11. Mod. 177. 264. 12. Mod. 207. 246. 346. 383. Fitzg. 149. 205. Stra. 61. 229. 726. 977. 1094. 1120. 1167. 1237. 1272. 2. Peer Wms. 496. 3. Peer Wms. 37. 238. 1. Bac. Abr. 290. 306. 1. Com. Dig. "Baron and Feme" (W.).

In

Michaelmas Term, 4. William & Mary, In B. R.

BUCKLEY
AND HIS WIFE
against
COLLIER.

In trespass, they may join for entering on the land *et herbam ipsorum ibidem crescent. asportavit, &c.* (a). So likewise where the husband has land in the right of his wife, as a jointure by a former husband, and she is to have the lops and throwds of the trees growing thereon, and he who has the inheritance cuts them down, they may join in an action to recover damages (b), because it survives to her after his death.

But THE COURT was of opinion, that in the principal case the declaration was not good, because the action was brought for a personal thing which would not survive (c), and in personal actions the law is clear that they cannot join (d).

(a) Cook and his Wife v. Carthrie, Cro. Eliz. 96.

(b) Bradstock v. Scovel, Cro. Car.

434-

(c) Arundel v. Short and his Wife, Cro. Eliz. 133.

(d) Judgment was accordingly given for the defendant, S. C. 1. Salk. 114. *quid querens nil capiat, &c.* S. C. Carth.

251.; for there being no *express promise* made to the wife to pay the money to her, the duty belonged solely to the husband, and therefore the law implies the promise made to him only, S. C. 3. Salk. 63. See Bradstock v. Buckingham, Cro. Jac. 77. 205. 1. Sid. 25. Pratt and his Wife v. Taylor, Cro. Eliz. 61. Hel- liar's Case, Stiles, 9.

Case 60.

Cook against Bosfinger.

Trover lies for a bond and a warrant, described as the goods and chattels of the plaintiff.

TROVER. The plaintiff declared, That he was possessed *de bonis et catallis sequen. ut de bonis et catallis suis propriis, VIDELICET, de uno scripto obligatorio et una warrantia, &c.* The defendant pleaded in abatement that the bond and warrant were not chattels.

Post. 321.

1. Roll. Abr. 5.
Cro. Eliz. 819.

* [157.]

Cro. Car. 89.

Cro. Jac. 638.

Hard. 111.

1. Salk. 283.

Ld. Ray. 276.

588. 824. 1181.

1219. 1529.

12. Mod. 3.

1. Peer Wms. 267. 1. Com. Dig. 8vo. 311.

Upon a demurrer to this plea it was said, that neither the bond or the value thereof can be demanded by such names as *bona et catalla*, because (as the opinion is in *Yelverton*) (e) a bond will not pass by such general names. * In *detinue* the thing itself must be specially named, because it is to be recovered *in specie*: the same reason may govern this case.

But it was answered, that by a gift of "all his goods and chattels" a bond would pass: and this was the opinion of FITZ-HERBERT, in *Dyer* (f).

And to his opinion THE COURT now inclined.

(e) Channel v. Rowbotham. Yelv. 68. (f) Dyer, 5. b.

Case 61.

Rudd against Foster.

If the will of A. contribute to the repairs of the church of B.

REPLEVIN for taking of a gelding. The defendant justified by virtue of the statute 43. *Eliz.* c. 2. for money due upon the *poor tax*. The parties being at issue, it was tried at the bar.

and perform all its marriages, burials, christenings, and other parochial rites in the parish of B. it shall be considered as a part of that parish at the time of making 43. *Eliz.* c. 2. although it had before a chapel of its own and distinct constables belonging to it.—S. C. Salk. 501. 2. Salk. 572. Raym. 67. Co. Lit. 115. 1. Lev. 78. Hob. 296. Ld. Ray. 549. 1013. 8. Mod. 39. 61. 10. Mod. 81. 12. Mod. 440. 504. 546. Fitzg. 297. Stra. 56. 630. 1004. 1071. 1114. 1143. 4. Com. Dig. "Justices of Peace" (B. 66.).

The

Michaelmas Term, 4. William & Mary, In B. R.

The question was, Whether the vill of *Stratton* was in the parish of *Biggleswade*, in *Bedfordshire*, or not?

Revs
against
FOSTER

The poor's rate was admitted; and the evidence to prove it to be in that parish was, that there were but two churchwardens and two overseers of the poor, and that marriages, burials, and christenings, and all other parochial rites, were done at *Biggleswade*, and that the inhabitants of the vill of *Stratton* did contribute to the repairs of the church of *Biggleswade*.

On the other side, to prove that *Stratton* was a reputed parish by itself at the time of the making of this statute, this evidence was given: viz. In the reign of *Edward the Third* there was a public chapel there, where the people went to hear mass, and that divine service was read in that chapel at the time of the making of this statute. Then it was proved, that a rate was made there in the year 1654; and that formerly they had distinct constables, and repaired their own highways till the year 1634; and then the difference between them was settled by the Judges in their circuit.

They would have this like the case between the parish of *Tateridge* and *Hatfield* (a), which was a special verdict upon this statute: The plaintiff lived in *Tateridge* and had no lands in *Hatfield*, but had lands where he lived; he was rated to the poor of *Hatfield*; but because at the time of the making the statute *Tateridge* was a reputative parish, and had distinct constables, churchwardens, and overseers of the poor, and made their own rates and * assessments, which were levied by their own officers, for this reason that was held to be a distinct parish from *Hatfield*. But *Stratton* was not so much as a parish in reputation at the time of the making of the act, and so not like that case; for all that was proved was, that they had made rates since the statute, and had a chapel before; but making rates will not make it a parish without all other parochial rites.

* [158]

And therefore IT WAS HELD to be a vill in the parish of *Biggleswade* (b).

- (a) *Nichols v. Walker*, Cro. Car. 394.; and see *Hilton v. Pawle*, Cro. Car. 92.
(b) *Rex v. Denham*, Burr. S. C. 35. the case of *Brewcomb Lodge*, 2. Salk. 301. *Rea v. Rufford*, Strange, 512. *Rex v. Welbeck*, 2. Stra. 1143. *Rex v. Justices of Bedfordshire*, Cald. 167. *Rex v. Justices of Peterborough*, Cald. 238. *Rex v. Ronton Abbey*, 2. Term. Rep. 207. *Rex v. Tamwalk*, Cald. 28. *Rex v. Sir Watts Horton*, 1. Term Rep. 374. *Rex v. Leigh*, 3. Term Rep. 746. *Rex v. Newell*, 4. Term Rep. 260. 266. The above cases are collected in Mr. Conft's Edition of *Bott's Poor Laws*.

Hoyle against Pitt.

Case 62.

PEMBERTON, *Serjeant*, moved in an appeal of murder, that the appellee having pleaded a conviction of manslaughter at the gaol delivery at THE OLD BAILEY, and that he was allowed slaughter; omitting the authority of the court, cannot be amended.—3. C. 3. Salk. 38. Post. 396. 3. Leon. 268. 1. Salk. 47. 53. Ld. Ray. 141. 968. 1061. 1303. 1. Com. Dig. "Amendment" (2. C. 1.).

To an appeal of murder; A PLEA of autrefois convict of manslaughter

his

Michaelmas Term, 4. William & Mary, In B. R.

NOTE
against
PITS.

his clergy; but not shewing by what authority that court was held, that therefore the plea might be amended, it being before issue joined or demurrer.

But the Court doubted whether this could be done by law; for the appellant could not amend, and therefore there was no reason why the appellee should have that liberty. In this case if you amend, you make a new roll (*a*); it is not like other cases of amendments, where all is in paper, and warranted by the usage of the court, for this is all upon the plea roll. No statute extends to amendments of either side in an appeal (*b*), and it is not warranted by the course of the Court.

(*a*) 1. Stra. 1026.

(*b*) By the statutes 8. Hen. 6. c. 12.; 8. Hen. 6. c. 15.; 32. Hen. 8. c. 30.; 18. Eliz. c. 14.; 21. Jac. 1. c. 13.; and 16. & 17. Car. 2. c. 8. which enable amendments after verdict, all *appeals* and *indictments*, with the process thereon, are

expressly excepted. — But by the common law, amendments may be made in criminal proceedings, *Ld. Ray.* 968. 1. Salk. 47. Stra. 1026. 1. Lev. 189. 1. Saund. 249.; and see *Rex v. Wilkes*, 4. Burr. 2527. where all the cases are collected, and the point discussed at large.

Case 63.

The King and Queen against Hicks.

An information on a penal statute must be brought in the county where the offence was committed; but an *action of debt* on a penal statute lies at *Westminster*, though the offence was committed elsewhere.

AN INFORMATION was brought on the 5. Eliz. c. 4. against *Marmaduke Hicks*, and it was laid in *Middlesex* in the name of *SIR SAMUEL ASTRY*, for exercising the trade of a grocer by the space of three months, not having served as an apprentice for seven years to that trade, *contra formam statuti, &c.* The defendant did not live in *Middlesex*, nor use the trade there, but in another county.

And upon a demurrer the defendant had judgment, because this information being grounded upon a penal law, it ought to be laid in the proper county where the * offence was committed, and not elsewhere, by the express words of the statute of 21. Jac. 1. c. 4. It is true, an action of debt will lie upon the statute of 5. Eliz. c. 4. in *Middlesex* (*a*), though the offence was done in *Cumberland*, because the statute of *King James* did not intend to deprive the courts of *Westminster* of such actions, but only of those which might be brought before justices of assize, or of the peace; now *informations* may be brought before them as well as in this court; but *debt* cannot.

* [159]

8. C. 1. Salk. 373.

8. C. 3. Salk. 350.

8. C. 12. Mod. 30.

1. Vent. 8.

1. Lev. 249.

Stra. 415. 776.

1. Sid. 400.

5. Mod. 425.

12. Mod. 223.

Ld. Ray. 372. 767. 872. 1028. 1188.

1. Com. Dig. "Action" (N. 10.).

(*a*) *Wade, Qui Tam, v. Ripton*, 1. Sid. 303; and *Barnes, Qui Tam, v. Hughes* 1. Sid. 400.

Bennet

APPEAL OF MURDER. The writ was concluded thus, "*et habes ibi tunc hoc breve.*" The count was, that the deceased was at the parish of *Clapham* in the peace of the king such a day and year, and that *ante meridiem ejusdem diei venerunt prædicti WILLIELMUS PRESTON et quidam DANIEL SCHOLY, &c.*

THE FIRST EXCEPTION was taken to the writ because of the word "*tunc*," which is never used in an original writ.

To which it was answered, that if that word had been left out, it might have been very well understood, for *habes ibi hoc breve* is well enough, and *tunc* is but *surplusage*. In an *audita querela* it was set forth (a), that the plaintiff *captus fuit virtute brevis nostri judicialis*, which word is not in THE REGISTER, and it was held *surplusage*, and the writ good.

THE SECOND OBJECTION was made to the count, viz. It is said, that *ante meridiem ejusdem diei* the appellee came, &c. and does not mention what *hour*; now the statute of *Gloucester* requires the certainty both of the *day* and *hour*, &c.

The answer was, that the year and day shall be accounted from the day of his death, and the hour is not material; for if it had been *circa horam ætquam*, it had been good.

Raft. Ent. 53. Co. Ent. 50. Stam. P. C. 80. 1. Bulst. 82. 2. Inft. 318. Carth. 17. 3. Mod. 158. Ld. Ray. 21. 1273. 1. Lev. 140. 2. Hawk. P. C. ch. 23. f. 87.

ANOTHER OBJECTION was, that it is said "*venerunt prædicti WILLIELMUS PRESTON et quidam DANIEL SCHOLY, &c.*" which is insensible and false Latin; for to say *prædicti* when there is but one mentioned before must be naught, and cannot be *surplusage* in an appeal; for if the word be wholly rejected, then *non constat* which of them killed the person; and if it be not rejected, then there is an adjective to a substantive not named before: and *quidam* for *quidam* is false Latin; so that this count is neither sense nor grammar.

* But it was answered, that false Latin will not vitiate *indictments*, neither shall it be allowed to make void *declarations* in appeals; it may abate an *original writ*, but shall not make any *judicial writ*, count, or pleading vicious; so is the second resolution in *Osborn's Case* (b). It is true, in an *assize* the writ was, that the sheriff should summon the tenants *quod sint coram præfat. Justiciariis apud Westm.* and no Justices were mentioned before, but the writ was not abated for this omission; the judgment was only stayed a little upon the first opening of the fault (c), but it does not appear that it was made void for that reason.

(a) Arundel v. Morris, 1. Leon. 73. (c) Plowd. 415.
(b) 2. Roll. Abr. 147.

A writ of appeal concluding "*et habes ibi tunc hoc breve.*" is good; for *tunc* shall be rejected as *surplusage*.

3. Bulst. 82. Cro. Jac. 377. 2. Saund. 308. 10. Mod. 86. 3. Pr. Wms. 433. 5. Corn. Dig. "Pleader" (C.28.) (E.12.).

An appeal of murder, alleging the fact to have been committed *ante meridiem ejusdem diei*, is sufficiently certain.

Post. 292. 2. Inft. 318. Carth. 17. 3. Mod. 158. Ld. Ray. 21. 1273. 1. Lev. 140. 2. Hawk. P. C. ch. 23. f. 87. False Latin will not vitiate an appeal of murder. S. C. 1. Salk. 328. 1. Lilly, 597. 4. Co. 39. 10. Co. 133. 11. Co. 32. Cro. Eliz. 108. 1. Leon. 73.

* [160] Ld. Ray. 195. 239. 1223. 1394. 8. Mod. 327. 377. 10. Mod. 254.

HILARY TERM;

The Fourth and Fifth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* *Westerne against Crefwick.*

* [161]

Cafe 65.

THE PLAINTIFF *Westerne* had obtained a judgment against the defendant upon a bond, and by virtue thereof had levied part of his debt upon some of his cattle, and sold them. This judgment was afterwards set aside.

If judgment be set aside, after execution in part levied, the plaintiff, on restitution of the goods levied being awarded, cannot pay, either to the defendant or into court, the money for which the goods were sold.

TREMAINE, *Serjeant*, now moved; that, since restitution was awarded to the defendant, the money for which the cattle were actually sold might be brought into court for the benefit of the defendant, who was then a prisoner in the king's bench,

But this was disallowed,

Then he offered to pay the defendant as much money as the cattle were sold for.

S. C. 3. Salk.
214.
Cro. Jac. 698.
2. Salk. 588.
1. Show. 262.

But that was denied likewise, because they might be sold for less than really they were worth; and if the defendant bring his action of trespass he will recover the full value, and therefore the plaintiff must agree with him to prevent such an action.

Hilary Term, 4. and 5. William & Mary, In B. R.

Cafe 66.

Patison against Milton.

If the name of the defendant be inserted in a declaration instead of the name of the plaintiff, it is cured by the verdict.

* [162]

Cro. Jac. 67.
1. Sra. 551.
642.
1. Rac. Abr.
108.
Cowp. 407 425.
1. Term Rep.
783.
4. Term Rep.
228.

THE DECLARATION was thus: " WILLIELMUS PATISON *"queritur de WILLIELMO MILTON in custodia mar. marescal. &c. pro eo videlicet quod cum WILLIELMUS PATISON (instead of MILTON) indebitatus fuit WILLIELMO PATISON, &c."*

* After a verdict for the plaintiff, it was moved that it might be amended, for it was a plain mistake of the clerk to make the plaintiff to be indebted to himself.

And THE COURT ordered that it should be amended accordingly without the help of the statute; as where an action on the case (a) was brought against an executor upon the promise of the testator who pleaded *non assumpsit*, and said nothing as to any promise of the testator, this was held to be good enough after verdict (b).

DOLBEN, Justice, said, that " *quidem tamen* JOHNSON, &c." without naming his christian name, was held good; for, as TWISDEN, Justice, said, he would intend his name to be *quidam*.

But a declaration in the common pleas was, viz. that the plaintiff *cognovisset se indebitatum fore* to himself; and after verdict for the plaintiff, this was moved, and (as it was affirmed at the bar) he could never get judgment in that court.

(a) Latch. 125. Noy, 38. Cro. Rep. 557.1 Harvey v. Stokes, Com. Eliz. 435. 204. Rep. 566.
(b) See Blacklock v. Mariner, Com.

Cafe 67.

The King and Queen against Tucker.

An attainder in high treason reversed for the following reasons.

S. C. 3. Lev. 396.
S. C. 2. Salk. 630.
S. C. Comb. 257.
S. C. Skin. 338.
360. 425. 442.
S. C. Carth. 317.
S. C. 12. Mod. 51.
S. C. Holt, 678.
S. C. Show. P. C. 186.
S. C. 1. Ld. Ray. 1.

ERROR to reverse an attainder in high treason committed in the west of England.

The indictment was, that the defendant and another, " not having the fear of God in their hearts, nor considering the duty of their allegiance, but being seduced, &c. *proditorie compassaverunt* to kill their supreme and natural lord," and that they waged war " *proditorie* against the king, their supreme, right, natural, and undoubted lord, &c. *contra pacem, &c. et contra formam statut. &c.*"

Upon this indictment they were arraigned, *et per curiam allocut.* what they had to say, &c. *separatim dicunt, &c.*

Then the judgment was thus, " *ducantur, et uterque eorum ducatur, usque ad gaolam, &c. et abinde usque ad locum executionis trabantur, &c. et super furcam ibidem per collum suspendantur, &c. et interiora sua extra ventres eorum et utriusque eorum capiantur, et ipsique viventibus comburantur, &c. quodque corpora eorum, et utriusque eorum, in quatuor partes dividantur, &c.*"

This

Hilary Term, 4. and 5. William and Mary, In B. R.

This cause depended many Terms before it received any determination by reason of the many exceptions which were made both to the indictment, and to the judgment.

THE KING
AND QUEEN
against
TUCKER.

AND FIRST as to the judgment.

* [163]

* FIRST, It was that they should be drawn to the place of execution, and does not say *super hurdellum*; and so is the case in *Staundford (a)*, and in the Year Book *(b)*.

A judgment in HIGH TREASON is good, although in ordering the offender "to be drawn to the place of execution" it omit to say "upon a hurdle."

To which it was answered, that most of the precedents are otherwise; it is left out in the *Third Institutes (c)*, where the form of the judgment is set down by my Lord Coke, whose authority may be opposed to that of *Justice Staundford (d)*.

"*dk.*"—*Staunf.* 102. 182. Co. Ent. 361. Plowd. 387. 2. Hawk. P. C. c. 48. f. 3.

SECONDLY, It was a judgment against two defendants, and it is said "*per collum suspendantur*;" and does not say "*uterque eorum*" "*per collum suspendatur (e)*."

Judgment against two, that they shall "be hanged by the

"neck," is good without the addition "*and each of them.*"—S. P. C. 182. Plow. 387. Co. Ent. 361. 2. Hawk. P. C. c. 48. f. 3. *notis.*

3. Inst. 110.

THIRDLY, It is also said, that "*corpora eorum in quatuor partes dividantur*," without these words, *viz.* "*et corpus utriusque eorum*;" for otherwise it is not sense, and it shall not be taken *reddendo singula singulis*. But this was an exception only mentioned, and not insisted on *(f)*.

So also to say, that "the bodies of them shall be divided, &c." is good, without

"*and the body of each of them.*"—S. P. C. 102. Plowd. 387. Co. Ent. 361. 3. Inst. 211.

FOURTHLY, "*quod secreta membra amputentur.*" This part of the judgment was left out. It was pronounced by my LORD CHANCELLOR FINCH in my *Lord Stafford's Case (g)* upon debate with the Judges what judgment must be given for a peer.

Judgment in HIGH TREASON is good, without saying "*quod secreta membra amputentur.*"

But as to that, it was said it was omitted in almost all the entries and ancient records; and that it was well comprehended in this judgment by the word "*interiora*," and that it was not in any judgment till the judgments against THE REGICIDES *(h)*.

3. Inst. 210. Plow. 387. Co. Ent. 361. Sum. 268.

2. Hale 397. Skin. 442. Carth. 318. 2. Hawk. P. C. c. 48. f. 3. *notis.*

(a) *Staunford's Pleas of the Crown*, 181.

(b) 1. Hen. 7. pl. 29.

(c) 3. Inst. 210.

(d) This exception was over-ruled, S. C. Carth. 318. S. C. Comb. 257.

(e) This exception was over-ruled, S. C. Carth. 318. See the statute 30. Geo. 3. c. 48. *infra*.

(f) This objection was over-ruled, S. C. Carth. 318.

(g) 3. St. Tr. Harg. Ed. 214.

(h) This objection, as well as the above, was also over-ruled upon view of several precedents both ancient and modern, where, in judgments of high treason, these particulars had been omitted, S. C. Carth. 318; but many precedents were produced in which they were inserted; and on account of these variances the exceptions were disallowed, S. C. Comb. 258. But see S. C. 1. Ld. Ray. 2. where it is said, that Holt, Chief Justice, declared, in the case of *Ren v. Walcot*, post. 395. that no notice was taken of the omission of the words "*secreta membra amputentur*" either in the king's bench or in parliament, Acc. Show. P. C. 187.—Now by the statute 30. Geo. 3. c. 48. f. 1. the judgment against any woman or women for high treason, or for petit treason, shall be, "that they shall be severally drawn to the place of execution, and there be hanged by the neck until she or they be severally dead."

deeds were produced in which they were inserted; and on account of these variances the exceptions were disallowed, S. C. Comb. 258. But see S. C. 1. Ld. Ray. 2. where it is said, that Holt, Chief Justice, declared, in the case of *Ren v. Walcot*, post. 395. that no notice was taken of the omission of the words "*secreta membra amputentur*" either in the king's bench or in parliament, Acc. Show. P. C. 187.—Now by the statute 30. Geo. 3. c. 48. f. 1. the judgment against any woman or women for high treason, or for petit treason, shall be, "that they shall be severally drawn to the place of execution, and there be hanged by the neck until she or they be severally dead."

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Accord of HIGH TREASON against "FIFTHLY, Upon the arraignment it is *per curiam allocut.* &c." what they had to say, and does not say *quilibet eorum separatim allocut.*

that "the Court demanded what they and each of them had to say, why, &c."—3. Mod. 265. 1. Show. 132. 2. Hale, 217. 2. Hawk. P. C. ch. 28. f. 6.

An indictment of HIGH TREASON is erroneous unless it conclude *contra ligeantiam suam debitum*. But SIXTHLY, the chief and most material exception was to the indictment, that it did not conclude *contra ligeantiam suam debitum*.

And as to that, those who argued to support it, said, that some formal parts were requisite to an indictment; but if the body of it contain what is essential and comprehensive of the fact, it is sufficient. Now here the fact is sufficiently set forth in the body of the indictment; there are several acts of treason charged in it; and it is laid throughout to be *proditoriè*, which must be against his natural allegiance, for an *alien enemy* cannot be thus indicted. * It is true, the law will not suffer facts to be made out by any strained constructions of words or inferences; but that cannot be objected here, because it is said, "that he, not weighing the duty of his allegiance, did levy war against his undoubted and true lord *contra formam statuti*," which are words enough to supply the omission of the other, and to make it plainly appear that it was against the duty of his allegiance.—This was enforced from some authorities which had some resemblance of this matter: As in an indictment for murder, it was omitted that the person slain was in *pace Dei*, for it might be that he was in the fault; yet it was held good (b). So for a riot, "*contra coronam*" was omitted in the indictment, yet it was not quashed, because these and such like words are only in aggravation of the offence, and not of absolute necessity to be used in such proceedings (c). So likewise *ex malitia sua præcogitata* was left out of an indictment for murder, but it was not quashed for that reason, because the word *murdravit* in that case (d), as well as *proditoriè* in this, implies that one was done out of malice, and the other against his allegiance (e).

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S. C. 3. Lev. 396.

Dyer, 145. 155.

Co. Lit. 129.

Hob. 271.

1. Roll. Rep. 185.

2. Salk. 630.

4. Com. Dig.

"Indictment"

(G. 6.).

2. Hawk. P. C.

c. 25. f. 55.

1. Bl. Com. 370.

5. Bac. Abr.

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Then it was insisted, that there have been many precedents without these words, and instanced in *Sir Henry Vane's Case* (f), and in *Cotton and Messenger's Case* (g), and many more, and yet the indictments were good; for if those words had been inserted, it had been only a formal conclusion from the premises in the indictment, and therefore shall not vitiate it being omitted.

(a) This exception was also over-ruled; for by HOLT, Chief Justice, they are *separatim allocut.* viz. *secundum subjectam materiam*, their offences being several, S. C. Skin. 338.

(b) 4. Co. 41, 42.

(c) 2. Roll. Abr. 82.

(d) Dyer, 68.

(e) 1. Bulst. 93.

(f) 1. Sid. 358.

(g) 1. Kelynge, 70. 2. State Trials, 581.

Besides,

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Besides, this is an indictment grounded upon a statute (a) which does not prescribe any form; and the defendant being found guilty, and judgment against him; it shall be intended, that what he did was *contra formam statuti*, and by consequence contrary to his allegiance.

If an indictment for high treason, the conclusion "against the form of the statute," will not supply the omission of the words "against his allegiance."

But this was denied, because the offence in the indictment was treason at the common law, of which the statute was only declaratory, and therefore the concluding *contra formam statuti* will not make it *contra ligeantiae debitum*.

PEMBERTON, *Serjeant, contra*. There was never yet any case wherein this point was contested and settled. The doing a thing against his allegiance is the very foundation of this indictment, and yet it does not appear that any thing was done contrary to it. * It is true, this indictment sets forth, "that the defendants, not considering the duty of their allegiance, did levy war *contra naturalem suum dominum*:" now this may be intended as well against the king in his politic as in his natural capacity. There is a legal as well as a natural allegiance, and therefore if an *alien ami* come hither and commit treason, the indictment must conclude, *contra ligeantiae suae debitum*; but an *alien enemy* cannot be tried by the common law, but by special commission to the constable or marshal; and this was *Perkin Warbeck's Case* (b) who was never under the king's protection, and therefore his indictment could not conclude *contra ligeantiae debitum*; which shews that these are words of substance, and cannot be supplied by any intendment whatsoever; for if it be treason, it must be against allegiance, and ought to be so expressed in the indictment. This is agreeable to the opinion of my LORD HOBART in *Courteen's Case* (c), that an alien in amity with us and living here, is under the protection of the king, who is *dominus suus*, though not *naturalis*; and if such an alien commit treason, the indictment must conclude *contra debitam allegianceam*. And if it is so in the case of an *alien ami*, *a fortiori* it ought to be so in that of a natural subject (d). The conclusion of an indictment goes to all, and therefore agreeable to this is the reason of the law in other cases; as in felony, if *contra pacem* be left out the indictment is never good (e). So in burglary, though there be sufficient in the indictment to imply the fact done to be burglary; yet if the word *burglariter* be left out, the indictment is naught (f). To say *furatus est equum* will not imply *felonice*, neither will *carnaliter cognovit* supply the word *rapuit*, for these are terms of art, adapted by the policy of the law to particular offences, and cannot be supplied by intendment (g). Before the statute of 37. Hen. 8. c. 8. the words *vi et armis* were so material

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(a) 25. Edw. 3. c. 2.

(b)

(c) Hob. 271. 7. Co. 6. 7. Co. 11.

(d) Co. Lit. 129.

(e) Coke's Ent. 253. Rastal's Ent. 263. 2. Roll. Abr. 82. 1. Mod. 78.

2. Hawk. P. C. ch. 25. f. 92.

(f) 4. Co. 39. 5. Co. 121. Cro.

Eliz. 920. 2. Hawk. P. C. ch. 23. f. 97.

and ch. 25. f. 55.

(g) 3. P. C. 96. 2. Hawk. P. C.

c. 23. f. 79. and c. 23. f. 56.

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in indictments, that many were reversed where those words were omitted (a), and though they were only formal words, and not so material as these, yet they could not be left out without the authority of a parliament. To say that *murdravit* will supply *ex malitiâ suâ præcogitatâ*, cannot be law (b); and therefore the print in *Dyer* is false (c). LASTLY, Here are no words in this indictment to supply the defect of these words, *contra ligeantiæ suæ debitum*. The * word "*proditorie*" will not do it, because a man may be treacherous and not act any thing against his allegiance; and as for the clause, "*contra naturalem suum dominum*," the indictment had been good *contra regem* only, without those words, so as the conclusion had been "*contra ligeantiæ suæ debitum*;" therefore those words cannot supply this omission, because it would be very absurd to say, what is necessary shall be supplied by that which is not. Upon the whole matter, it would be dangerous to admit innovations in indictments; and therefore the usual form being to conclude after this manner, it must not be omitted, especially considering the reason of the thing; for *allegiance* and *protection* are correlatives, and do *mutuò se tolli et ponere*.

THE COURT, held that for want of concluding with these words, "*contra ligeantiæ suæ debitum*," the indictment was erroneous; and that such an omission will make it so, though there are words in the body of the indictment which *tantamount*, because a man may levy war, and not be guilty of the offence as laid here; for he may be an *alien enemy*; and that was the reason in *Calvin's Case* (d) why that indictment was not concluded *contra ligeantiæ debitum*. But there are no words in this indictment to supply this omission; for "*debitum ligeantiæ suæ minimè ponderans*" will not do it, because a man may not consider the duty of his allegiance, and yet do nothing which is contrary to it. Then "*contra dominum regem supremum, verum, et naturalem dominum suum, &c.*" will not help it, because those words are not always essential in an indictment; they signify no more than to shew that the offender was born in *England*; they are words superabundant, and were added to indictments in latter times; for the old way was to set forth the offence to be *contra dominum regem* only; so that words which are not necessary in an indictment, shall never be construed to supply the omission of those which are absolutely necessary. The very

(a) Cro. Jac. 473. Skin. 426. 2. Lev. 221. 2. Hale, 187. Stra. 834. But see 2. Hawk. P. C. c. 25. f. 90. and 91. and the case of *Rex v. Burridge*, 3. Peer Wms. 464. 448.

(b) Bro. Abr. "Indictmen.," pl. 7. 2. Hawk. P. C. c. 23. f. 77. and c. 25. f. 55.

(c) *Dyer*, 504. pl. 56. The edition of *Dyer* in 1658 is, that A. *ex malitiâ præcogitata inultum fecit et ipsum B. felonice percussit dans ei unam plagam, &c. et sic predictus A. ipsum B. felonice interfecit*

et MURDRAVIT. The question was, Whether this was murder, or only homicide? And it was resolved, "that without this word '*murdravit*' it is only homicide." See the New Edition of this work by J. Vaillant, Esq. 1793.

(d) 7. Co. 1. See also *Cranburn's Case*, Salk. 633.; *Dr. Storey's Case*, *Dyer*, 298. pl. 29. and 300. pl. 38.; and the case of *Eneas Macdonald*, *Foster's Cro. Law*, 59. 183. 186. 1. Hawk. P. C. c. 17. f. 5.

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offence of treason is, because it is committed *contra ligeantiae debitum*; the other words are but an aggravation of the offence, and the omission of that clause can be no more supplied by the adverb *proditorie*, than the word *felonice* could supply *contrapacem* (a).

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* It would be very strange if the omission of *contra pacem* in an indictment at the common law, and *contra formam statuti* for an offence committed against a particular statute, should be error, and yet an omission of these words should be none. It is probable this may be a reason for the making of the statute of 29. Eliz. c. 2. by which it is enacted, "that no record of attainder of treason shall be reversed where the party attainted is executed for the same offence;" for before that statute there were few precedents which have these words, and since the statute there are few or none, besides this, wherein they are omitted. It is true, there are several indictments in the reign of *Henry the Eighth* against offenders for *high treason*, which was made so by some new statutes in those days; as denying his supremacy, &c. in which indictments these words were omitted; but the reason was, because they were new treasons created by particular acts of parliament, and it is probable that the proceedings in those cases begat this error.

And for these reasons, in *Easter Term* in the sixth year of *William and Mary*, the judgment was reversed; which reversal was afterwards, in *Hilary Term* in the seventh year of *William*, affirmed in parliament (b).

(a) Cro. Car. 120.

(b) The judgment was affirmed by one voice only, 3. Lev. 396.

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Case 68.

BY the statute 37. Hen. 8. c. 1. it is enacted, "That no person shall be nominated and appointed to the office of *custos rotulorum* but such as shall have a bill signed by the king's hand for the same; which bill shall be a sufficient warrant to the lord chancellor, or lord keeper, to make from time to time commission or commissions, assigning and authorising the same person to be *custos rotulorum*, until the king has by another bill, signed *peace*, during the time that the said *custos rotulorum* shall occupy the said office of *custos*, so as the said *clerk of the peace* demean himself justly and honestly." By the 1. Will. & Mary, c. 21. f. 1. the *custos* is authorized to nominate a *clerk of the peace* "for so long time only as such *clerk of the peace* shall well demean himself in his said office." An appointment made by a *custos*, under these statutes, is, as to him, an appointment for life, and therefore the *clerk of the peace* so appointed cannot be removed from his office by the same or any succeeding *custos*; but by the same statute 1. Will. & Mary, c. 21. if he do not "well demean himself in his office" THE SESSIONS of the county, on application and proof made as the act requires, may remove him.—S. C. 1. Show. 426. 506. 516. S. C. Comb. 209. S. C. 12. Mod. 42. S. C. Holt, 189. S. C. 1. Ld. Ray. 161. S. C. Show. P. C. 158. Ante, 31. Co. Lit. 42. 1. Roll. Abr. 844. 1. Show. 182. 6. Mod. 193. 4. Com. Dig. 154. 2. Bac. Abr. 272.

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“ with his own hand, appointed, and ordained, one other person to have, occupy, and exercise the office.”—“ And the person so appointed *custos rotulorum* shall and may occupy, exercise, and enjoy the said office by himself, or by his sufficient deputy.”—“ And every *custos rotulorum* shall nominate, elect, appoint, and assign the clerk of the peace, and shall give and grant the said office of clerk of the peace to an able person, to hold and enjoy the same during the time that the said *custos rotulorum* shall occupy and exercise the said office of *custos rotulorum*, so that the said clerk demean him in the said office justly and honestly; and the said clerk of the peace may execute the office by a deputy to be appointed by the *custos*.”

By the statute 3. & 4. *Edw. 6. c. 1.* it is enacted, “ That the chancellor, or lord keeper, for the time being shall, from time to time, without any bill or bills to be assigned with the king’s hand, name, elect, assign and appoint such person to be *custos rotulorum* within every shire, as by his discretion shall be thought able and meet to have and exercise the same; and that the said person so appointed, elected, named, or assigned by the chancellor, or lord keeper, shall and may occupy, exercise, and enjoy the same office of *custos rotulorum* by himself, or by his sufficient deputy or deputies in as ample and large manner and form, as if the said act 37. *Hen. 8. c. 1.* had never been made.”

By the statute 1. *Will. & Mary, ft. 1. c. 21. f. 4.* it is enacted, “ That the nominating and appointing of the *custos rotulorum* throughout all the shires and counties of this realm, shall be as is directed by 37. *Hen. 8. c. 1.* any law, usage, or statute to the contrary notwithstanding.”

By statute 1. *Will. & Mary, c. 21. f. 5.* it is further enacted, “ That the *custos rotulorum*, or other person to whom of right it doth or shall belong to nominate and appoint the clerk of the peace, shall, when the office of clerk of the peace shall be void, nominate and appoint one able and sufficient person residing in the said county, for which he is appointed to execute the same by himself, or his sufficient deputy, for so long time only as such clerk of the peace shall well demean himself in his said office.”

• [168] And by said statute 1. *Will. & Mary, c. 21. f. 6. ** “ If such clerk shall misdemean himself in the execution of his said office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices of peace in their general quarter sessions, it shall be lawful for the said justices, or the major part of them, from time to time, upon examination and due proof thereof, openly in their said general quarter sessions, to suspend or discharge him from the said office; and the *custos* in such case may appoint another residing within the county; and if the *custos* neglect or refuse so to do before the next sessions after such refusal, then the justices may at their sessions appoint one.”

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Also by the said statute 1. *Will. & Mary*, c. 21. s. 8. " *The* HARCOURT
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" *custos* shall not sell the office of clerk of the peace upon penalty
" of both being disabled to hold their respective offices, and for-
" feiting double the value of the money so given and taken, to be
" recovered by him who will sue for the same by action of debt, &c.
" to his own use, and the clerk of the peace before he enters upon
" his office is to make oath in open sessions that he hath, nor will
" not pay any money, or reward for the same."

The foregoing paragraphs are the substance of the several statutes relating to the following case.

An *indebitatus assumpsit* was brought against the defendant for receiving forty shillings fees belonging to the office of the clerk of the peace of *Middlesex*. Upon *non assumpsit* pleaded, the jury found a special verdict in which the aforesaid statutes 37. *Hen. 8.* and 1. *Will. & Mary*, were found: then they find that the *Earl of Clare* was, in the first year of *William and Mary*, constituted by the king and queen to be *custos rotulorum* for that county, and that the office of clerk of the peace being void, the said *Earl* did, by a writing under his hand and seal, appoint the plaintiff, *Mr. Harcourt*, to be clerk "for so long as he should demean himself well, &c." and that he was duly qualified, &c. They find that in the third year of *William and Mary*, the said *custos* was removed from his office, and that *William Earl of Bedford*, by letters patents, &c, was made *custos* in his room, who, by writing under his hand and seal, did constitute the defendant, *John Fox*, to be clerk of the peace of the said county "during the time the *Earl* should enjoy "the office of *custos*, and so as he well demean himself, &c." that he was likewise duly qualified, and that he took upon him the execution of the said office, and received the fees, &c.

The question upon this special verdict was, Whether the plaintiff being clerk of the peace by *John Earl of Clare*, had a * good title to hold that office during life; or, whether it was dependent upon the *custos*, and determined by his removal?

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And as to that, it was considered how this office stood at the common law before the making of those statutes of *Henry the Eighth* and *Edward the Sixth*, and how it stands at this time upon the new act of this king.

At the common law all officers of justice had estates in their respective offices during life, and could not be removed but for misdemeanors: so was the clerk of the crown in the court of king's bench and in chancery: so are the clerks in the exchequer and the flazers of the common pleas: and in this respect, the wisdom and policy of the law is very great, because when men held their offices for life, it was an encouragement to the faithful execution of their duties; it was then also they endeavoured to acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not liable to be displaced at the pleasure

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pleasure of those who put them in (a). Now though it cannot be said that the *clerk of the peace* is an officer at the common law, yet he shall have an estate for life in his office, because of the uniformity between him and officers of superior courts; for his being nominated by the *custos* does not make him dependent on that officer any more than the *clerk of assize*, who is appointed by a Judge, but has an estate for life, and no dependence upon that Judge who made him. Neither is the *clerk of the peace* a clerk to the *custos* but to the justices in their sessions; he has his fees and wages allotted out of the fines and amerciaments arising in their courts (b). He is incorporated by a statute; for in a robbery the hundred shall be sued in his name (c). In the Year Book (d) he is called *attornatus domini regis*; he joins issue upon traverses; joins in demurrer (e); and in many other instances he is, in the court of sessions, as the *clerk of the crown* is in the court of king's bench. Thus it stood before the making of the statute of 37. Hen. 8. c. 1. the *custos* at that time being entirely at the nomination of the lord chancellor; but by that law he is restrained *sub modo*; that is, he shall still make a *custos*, but not without a bill signed by the king, appointing the person; and by this statute the *clerk of the peace* was made dependent on the *custos*, who could grant that office but only to continue during the time he was *custos*; so that when he was removed the other was determined. But it was found by experience to be very inconvenient that upon every death or removal of a *custos*, the king should be troubled by petition to sign a bill, &c. therefore * by the statute of 3. & 4. Edw. 6. c. 1. the *custos* is restored to his former right, viz. to be appointed by the lord chancellor as if that act had never been made; but it does not mention the *clerk of the peace*, so that he remained as before. But then by the statute of 1. Will. & Mary, c. 21. he is likewise restored to his former right; for now the statute of 3. & 4. Edw. 6. c. 1. is repealed, and the *custos* is to be as directed by the statute of 37. Hen. 8. c. 1. and so far it is a reviver of that law; but then it settles in what manner he shall appoint a *clerk of the peace*, viz. not for so long time as he shall continue *custos*, but for so long time only as the clerk by him named "shall behave himself well in the office;" and so far it is introductive of a new law, or rather restoring the *clerk of the peace* to that ancient right which he had to this office during his life, before the making of any of these statutes. Now it seems that the parliament intended him an estate for life; for the words, "so long as he shall behave himself well," do naturally import as much: besides, it is made unlawful to buy or sell this office, and an oath enjoined this officer before he enters upon the execution of it; the meaning of which must be, that when he is in he has an estate for life; for what need is there of so much care if he was to be removed at pleasure, or had any dependence upon the *custos*?

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(a) 1. Show. 428. 3. Bac. Abr.

733, 734.

(b) 12. Rich. 2. c. 10.

(c) 25. Eliz. c. 13.

(d) 2. Hen. 7. pl. 1.

(e) Cases in Cro. Law, 373.

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And as to that it is plain, that by the frame and penning of this act he has no relation to or dependence upon *the custos*, when once he is in his office; for his misbehaviour is not to be punished by *the custos*, but by the justices, who may suspend or discharge him, which they could not do before this act, for it was then wholly in the power of *the custos*; he is now to be "resident in the county," which was not enjoined before; he may make a deputy without the approbation of *the custos*, which he could not by the statute of 37. Hen. 8. c. 1. so that now there is another sort of power and jurisdiction over him which was not before. And as there is another jurisdiction over him, so he has another interest vested in him by this new law, which he had not by that statute; for as to the appointment to this office both these acts are penned alike, *viz.* it shall be by *the custos*; but then the act of 37. Hen. 8. c. 1. limits his estate only, "during the continuance of *the custos* in "his office;" and this new act leaves out that clause, and limits it for "so long time only as he shall demean himself well:" so that both these laws are in the affirmative; and because they both concern the same office, and the latter is introductive of a * new law, therefore that must be observed, and it is as absolute a repeal of the former, as if there had been negative words for that purpose. Lastly, to shew that the *clerk of the peace* has no manner of dependence upon *the custos*, this new statute provides, "that upon the neglect or refusal of *the custos* the greatest "part of the justices in their sessions shall appoint one:" and if that be done as it may, then no man will say that such clerk can depend upon *the custos*: and if his office shall continue during life, as it certainly will, what reason can be shewn why one appointed by *the custos* should not enjoy it in like manner?

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E contra. Whatever the common law was in relation to offices and officers, it can be nothing to this purpose; for this case depends only, as the law now stands, upon the penning of these several statutes. Justices of peace were made by the statute of 1. Edw. 3. c. 16. but that office is not mentioned there, neither was there any such officer in the succeeding reign of *Richard the Second*: it is very probable that *the custos* himself was then *the clerk* to the justices, and afterwards when the office of *custos* came to be honorary, a more inferior person was appointed to be their clerk, and from that time this officer was called *clerk of the peace*, but still he was but as a deputy or servant to *the custos*, and removeable at his pleasure, as *the custos* himself was at the pleasure of THE CHANCELLOR. Afterwards some chancellors enlarged their power by undertaking to make a *custos* during life, and he likewise enlarged his authority by appointing a *clerk of the peace* to hold that office during life: complaint was made of this matter to the parliament of *Henry the Eighth*, and then in the thirty seventh year of his reign this law was made, which gives the *clerk of the peace* no longer title to his office, but at will; it was to depend on *the custos*, who likewise was to continue in his office but till the king should appoint another. It was not the ignorance or incapacity of *the clerk* of which the complaint was in those days, but only the

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the duration of his being an officer; the complaint was, that he had an estate for life, which was to pervert the old institution, and therefore he was made to depend merely on *the custos*. In the reign of *Edward the Sixth* part of the statute of 37. *Hen. 8. c. 1.* was repealed, but that parliament did not meddle with the *clerk of the peace*; he still remained as before; so that what alteration is made relating to him must be by this new law, or none at all. It has been said that this law of 1. *Will. & Mary, c. 21.* vests him with a new and more durable estate than he had before, *viz.* by enlarging it to continue "for so long time only as he shall demean himself well." But these words cannot be construed to enlarge his estate; they are rather restrictive, and are only to express what was implied before; for it is a condition which the law annexes to all officers, that they shall behave themselves well in their respective offices, or otherwise it is a forfeiture. *The custos* is still to be removed at pleasure: now it would be very absurd to say that the person appointed by him to be *clerk of the peace* should have a more fixed and continuing estate than he himself; so that by reason of the incapacity of the grantor he cannot have an estate for life; for in construction of grants there is always a great regard to be had to the estate and power of the grantor: as, if a tenant in tail make a lease for life, it shall be intended for the life of tenant in tail; but if a tenant in fee make a lease for life, it shall be for the life of the lessee; and the reason is, because of the different capacities of those two persons; for the one could make a lease for no longer than his own life, and the other may make a lease for a longer term. If there had been any seeming contradiction between these two acts, then certainly the last would have repealed the other; but here is no such thing, for by the statute of 37. *Hen. 8. c. 1.* the *clerk of the peace* is to hold his office "no longer than *the custos* continues to be so;" and by this new law he is to enjoy it "for so long time only as he shall demean himself well:" now there is no contradiction in the limitation of the estate by both these laws; for suppose it had been put all together in the same act, *viz.* "for so long time as the *custos* shall continue," and "so long only as he demeans himself well," this would have been very consistent.

* [173]

CURIA. As to the beginning of this officer we are much in the dark, for we can only make some probable conjectures about it; and as to his continuance in his office, it is not to be collected out of any of the law books before the statute of 37. *Hen. 8. c. 1.* It is plain, that it was not an office time immemorial, because the commission of the peace is not so. In the first year of the reign of *Edward the Third* *justices of the peace* were made, who at the common law were called *conservators*, and the first beginning * of a *custos* was in the thirty-fourth year of that king; and the reason why he was then appointed, and not before, was, because *the justices* could not then agree amongst themselves who should keep the records; and upon application made to the king concerning this matter, he (to prevent all disputes)

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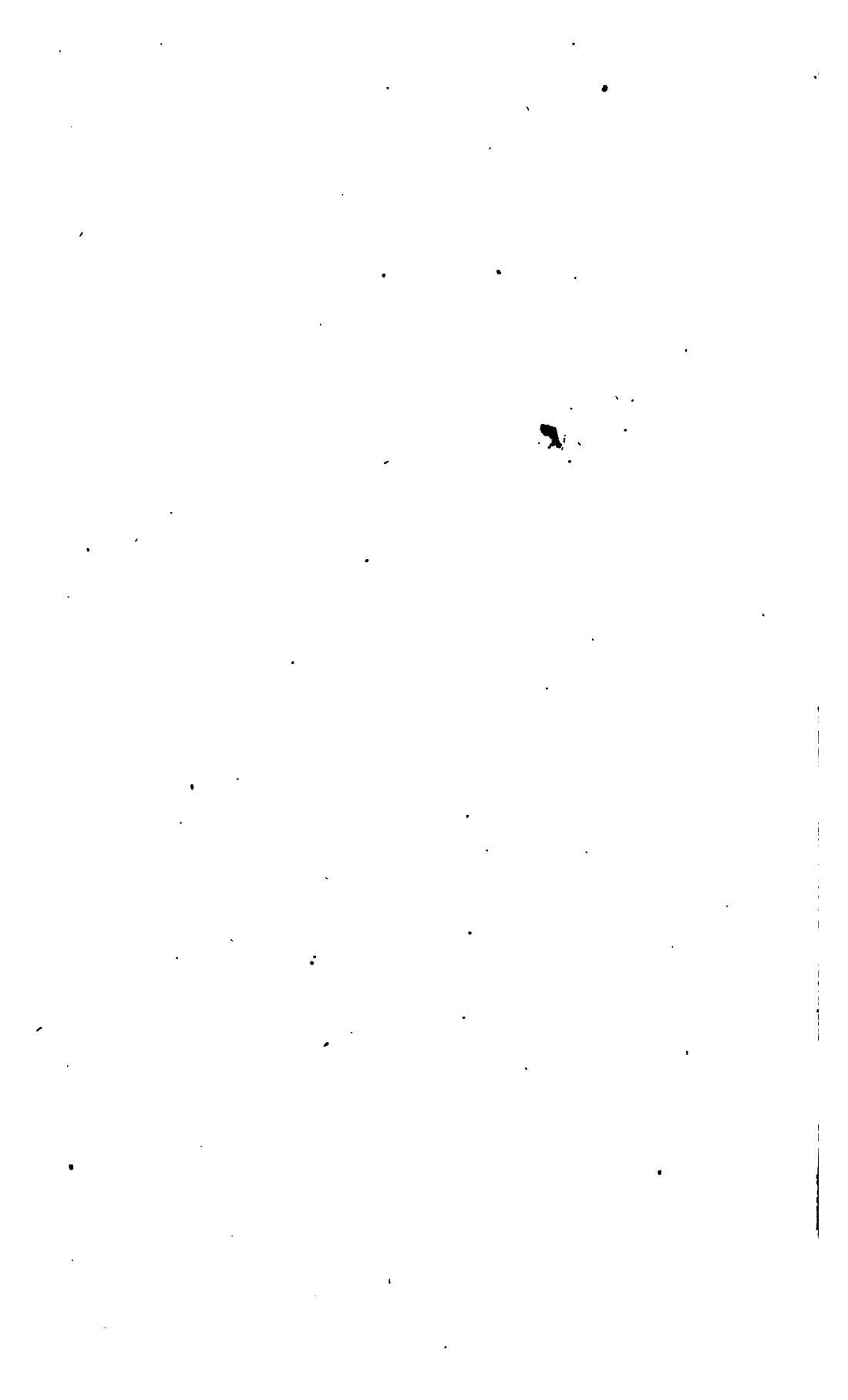
putes) appointed a fit person to keep them, and gave him the custody of the records in every county; so that though legally they may be said to be in the custody of the *justices of peace*, because all writs of error and *certiorari's* are directed to them, yet they are actually in the possession of *the custos*. Afterwards it became incident to the office of THE LORD KEEPER to nominate the *custos rotulorum*; and then because of the necessity of one to make entries, and join issues, *the custos* appointed a clerk for that purpose, who is now called *clerk of the peace*; and this seems very agreeable to the statute of *Westminster the second (a)*, by which it appears that such officers and clerks who are to enter and enroll pleas, were always appointed by the Judge or chief minister of the same court. Then as to the case in question, *viz.* by the statute of 1. *Will. & Mary*, c. 21. *the custos* has power to appoint a person to execute this office by himself or deputy, "for so long time only as he shall demean himself well, &c." which words do plainly import an *estate for life*; and the case would have been the same if the word "only" had been left out; for if power be given to a tenant for life to make a lease for twenty-one years only, this would signify for so many years absolutely. If this clause has not a construction to give him an estate for life, it signifies nothing; for if the case is taken to be no otherwise than as it stood upon the statute of 37. *Hen.* 8. c. 1. then this clause is of no use; but it is plain that the words in that act relating to this matter are omitted in this new law, *viz.* "that he shall continue so long as the other "is *custos*;" and a better and more fixed estate is given, *viz.* *quamdiu se bene gesserit, &c.* The statute of 1. *Will. & Mary*, c. 21. revives that of 37. *Hen.* 8. c. 1. as to the nomination of a *custos*, but makes several alterations from it when it mentions the *clerk of the peace*, as has been well observed at the bar: so that the design of this later act was to abridge the power of *the custos*, and enlarge the estate of *the clerk*, and so to settle him therein that he might go on cheerfully in his business; for when places depend upon contingencies, it occasions embezzling records and neglect in offices; and for this reason my Lord* *Hobart* (b) was of opinion, that the Chief Justice cannot grant the offices which are in his gift for less time than for life. Therefore the *clerk of the peace* being in this office by virtue of this act "for so long time as he shall demean himself well," those words shall be construed most favourably to answer the intent of the law-makers, whose design was to have the office well supplied by a man able and well skilled in the laws, which will be effected when the officer has an *estate for life*.

HARCOURT
against
Fox.

* [174]

And for these reasons JUDGMENT was given in *Trinity Term* following for the plaintiff; and afterwards affirmed in parliament.

(a) Cal. 30. See 2. Inst. 425. (b) Hob. 153.
3. Bac. Abr. 721.



E A S T E R T E R M,

The Fifth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* Hill 'against Gallop.

* [175]
Case 69.

THE PLAINTIFF brought an action on the case for a disturbance in a common, and declared, that he was possessed of a messuage and so many acres of land with the appurtenances in, &c. for a certain term of years, yet to come and unexpired; and that *per totum idem tempus habuisset et gaudere debuisset communiam pasturæ pro omnibus averiis levan. et cuban. &c.*

Upon not guilty pleaded the cause was at issue, and the plaintiff had a verdict.

TREMAINE, *Serjeant*, moved in arrest of judgment, because the plaintiff had not shewn any title in himself, either by grant or prescription.

Sed non allocatur.

THE CHIEF JUSTICE. This might be a good exception upon a demurrer, but it is cured by a verdict.

Skin. 213. 621. 3. Lev. 73. 266. 2. Lev. 148. Lut. 120. 1. Show. 18. 1. Salk. 22. 360a.
1. Id. Ray. 266. 4. Bac. Abr. 15. Comy. Rep. 7. 1. Burr. 440. 443. 1. Wilf. 326.
3. Wilf. 456. 2. Bl. Rep. 817. 926. 1. Term Rep. 428. 3. Term Rep. 147. 766.

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M

Sands

In a declaration for disturbance of common, it is sufficient to say, that the plaintiff was possessed of land, and that he had et habere debet common therein, without shewing title by grant or prescription.

S. C. Holt, 548.
Post. 411. 423.
8. Co. 87.
Cro. Jac. 43.
123. 158.
Owen, 109.
2. Vent. 292.
1. Vent. 319.

Process issued by the court of admiralty to stop the sailing of a ship on a pretence of an illegal voyage, is a prosecution within the meaning of the statutes of 15. *Rich.* 2. c. 5. and 2. *Hen.* 4. c. 11. although nothing farther be done; and therefore if a person procure and be at the charge of such process, an action on the case will lie against him upon the statute 2. *Hen.* 4. c. 11. although such process was immediately granted at the instance of the king's advocate, by order from the privy council. — But in such action all the owners of the ship ought to be joined, or the defendants may plead the jointenancy in abatement; but if they do not plead it, the omission cannot be taken advantage of on evidence.

ERROR OF A JUDGMENT in the common pleas in an action on the case brought by the plaintiff *Sands*, for prosecuting of him in THE ADMIRALTY contrary to an act of parliament; in which there was a special verdict found, and judgment for the plaintiff, and damages to fifteen hundred pounds.

The case upon the pleadings was thus :

The declaration sets forth the statute of 13. *Rich.* 2. ft. 1. c. 5. " That the admiralty and their deputies shall not meddle with any thing but what is done upon the sea, &c." Then it recites the statute of 2. *Hen.* 4. c. 11. which takes notice of the former act, and ordains, " That the common law shall be put in execution against prosecutors in the admiralty by an action on the case, and the party grieved shall recover double damages, and the prosecutor, being attainted, shall forfeit ten pounds to the king." It then states, that on the thirteenth day of *December*, in the thirty-fourth of *Charles the Second*, *Mr. Sands* was going to the *Madeiras*, in the ship called the *Expectation*, laden with divers goods, to trade there; and being about to sail, the now plaintiff, *Child*, did cause a *plaint* to be levied against him in THE ADMIRALTY COURT, and that thereupon process did issue out of the said court to stop the said ship from a voyage to Infidels without the king's licence; and the ship was arrested till *Mr. Sands* should give security that he would not sail into any part of the limits of THE EAST-INDIA COMPANY, which he refused to do. They find, that *King Charles the Second* granted to the Governor and Company of *East-India, &c.* a patent, by which they were incorporated, and had the whole trade to THE INDIES, prohibiting all other persons to trade within their limits, and the places in the said patent contained, upon the forfeiture of ship and goods; that *Mr. Sands* had prepared this ship to sail for the *Madeiras*, and from thence to a certain place in the *Indies*, within the limits of the Company, to trade with the Infidels, to prevent which the plaintiff *Child* and others delivered a petition to the king in council (which was found in *hæc verba*), praying that the ship might be stayed till security was given not to trade within the limits of THE COMPANY; and thereupon an order of council was made (a), directing THE COURT OF ADMIRALTY to issue out process against the ship till security should be given to the said court that the

* [177]

* ship shall not trade with Infidels within the limits of the charter; and that the plaintiff *Child*, and *Leach* as agent of the Company, obtained a warrant upon this order against the ship, by force whereof she was stopped.

¶ C. 3. Lev.

351.

S. C. Salk. 31.

S. C. Carth.

894.

S. C. Skin.

334.

S. C. Comb.

215.

Raym.

489.

3. Lev.

553.

Godb.

366.

5. Com. Dig.

"Pleader"

(2. S. 25.).

1. Bac. Abr.

624.

3. Bac. Abr.

584.

385.

(a) Raym. 489.

There

Easter Term, 5. William & Mary, In B. R.

There was a judgment for the plaintiff *Sands* in the common pleas, and damages in *duplo* to fifteen hundred pounds.

SANDS
against
CHILD.

A WRIT OF ERROR now brought, and the error assigned was in point of the judgment given, *viz.* Whether the matter, upon the whole record, is sufficient to charge the defendant *Child*?

And as to that, the argument was upon these two points:

FIRST, That what was done by him was lawful.

SECONDLY, That he has not incurred the penalty of the statute, because this is not a *prosecution* within the meaning thereof.

As to THE FIRST POINT, It will not be denied but that the king by his prerogative may stop the ship of any subject, and shut up the ports of the kingdom at his pleasure, especially where the safety of the nation is concerned, *viz.* in time of an imminent danger. This is confirmed by daily experience of *embargoes* laid on outward-bound ships (a). And as he may stop *the ships*, so he may restrain *the persons* of his subjects from departing the kingdom, lest they should assist his enemies; and for this purpose was the writ *ne exeat regno* framed (b): and after such an express prohibition, it is a contempt of the king's authority to depart out of the realm; and finable by law (c). Now to prevent such departure of ships the method is, and always has been, to inform the king of the matter by petition, who thereupon usually directs his *advocate* or *proctor* to require caution that the matter shall not trade with Infidels, who are *perpetui inimici*; and thereupon process issues out of the admiralty, and the ship is arrested; and this is in conformity to the common law of the land, as may appear by the writ *de securitate inveniendâ quod se non divertat ad partes externas sine licentiâ regis*; and my LORD COKE has affirmed that he had seen such a licence in the time of *Edward the Third*.

F. N. B. 95.
Dyer, 296. d.

As to THE SECOND POINT, This is not a *prosecution* intended by either of the aforesaid acts, which restrain the jurisdiction of THE ADMIRALTY; and this will appear, if it be considered upon what complaints and petitions those laws were made. * For the statute of 13. *Rich. 2.* st. 1. c. 5. was made upon the petition of several lords of franchises, complaining that the admirals and their deputies had kept their sessions within their liberties, and so had encroached upon their rights. The other statute of 15. *Rich. 2.* c. 3. was

* [178]

See 3. Mod.
245. *notis.*

(a) 1. Bl. Com. 271.

(b) *Ne exeat regnum* was originally a state writ, granted by the chancellor on application from the secretaries of state without cause, or shewing such information as his lordship should think of weight, Lord Bacon's Ordinances, No. 89. but was afterwards made use of in aid of the king's subjects, to help them

to their just debts, *Ex parte Bruncker*, 3. Peer. Wms. 313.; and also in the case of intrepopers in trade, great bankrupts in whose estates many subjects might be interested, in duels, and in other cases that did concern multitudes of the king's subjects. 3. Peer. Wms. 313. *notis.*

(c) Dyer, 185. 296.

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against
CHILD.

4. Cro. 133.

Godb. 385.
1. Roll. Abr.
29.

* [179]

Lit. Rep. 27.

Noy, 181.

2. Inst. 54.

made upon the like complaint ; but then also divers cities and boroughs petitioned against the encroachment of THE ADMIRALS, by holding pleas of contracts, wrecks, nuisances, &c. and for summoning of people at great charge and expence to attend their courts at London, and imprisoning them upon refusal. Now the cause for which this ship was stopped was not for doing any thing prohibited by either of these statutes, or for any thing contained in the petition upon which the order was made ; it is only that the people should not trade with Infidels without the king's licence, lest they should decline from their faith and religion ; so that it was not for doing any thing, but only a caution to prevent a thing from being done. Then as to the statute of 2. Hen. 4. c. 11. which gives an action on the case to the party grieved by a prosecution in the admiralty, the meaning must be, when he is grieved by a vexatious suit brought in their court to abridge the power of the courts at the common law, which was not done by the defendant, because THE COURT OF ADMIRALTY had a jurisdiction over this matter. Besides, this last statute, which gives the action against the prosecutor in the admiralty, does likewise give the king ten pounds upon his attainder ; but this proceeding being by order from the king himself in council, it can never be intended that he shall have any forfeiture for a prosecution made by his express direction, which is a reason why this is not such a prosecution as is intended by the act. But really this was no suit at all ; for there was neither plaintiff, nor defendant, nor any thing in demand ; here was no libel on which to ground a prohibition, and so by consequence no cause for an action against the plaintiffs in error, who were only agents to THE EAST-INDIA COMPANY ; so that, if an action must be brought, it ought not to be by Mr. Sands alone without his partners, and it ought to be against THE COMPANY ; for these persons only as their agents petitioned the king in council, and required caution, &c. ; the king directed the method ; so that if this be a suit, if it be a prosecution, it was for the benefit of THE COMPANY, and the action ought to be brought against them ; and it being upon a penal law ought not by equity to be * extended to the agents, for they are not to be punished by such a law unless named ; and therefore in the statute 16. Ricb. 2. c. 5. of Præmunire, and other statutes, they are expressly named.

E contra.—FIRST, The stopping of this ship was illegal. At the common law no man is prohibited to travel out of the realm. The seas are open, and he might go whither he would, without any restraint upon his person or goods, whether he traded with Infidels or not : and this appears by the statute of 26. Hen. 8. c. 10. which gave the king power, during his life, to restrain trading beyond sea to particular places, which had been to little purpose if he could have done it by his letters patents without the help of an act of parliament ; and the common law being restored by the expiration of that act, no force of restraint can now be put upon any man's property without a breach of the peace. No interference can be made from embargoes, or from the writ *ne exeat regno*,

Easter Term, 5. William & Mary, In B. R.

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against
CHILD.

regno, to extenuate what was done in this case; for the one is never laid upon ships but in time of war; it is a prohibition of state by advice of the council, and not at the prosecution of parties, as this was, under the pretence of trading to Infidels; for both Mr. Sands and his ship's crew might have gone to any Infidels, so that they would refrain from those of THE COMPANY. Then as to the writ *ne exeat regno*, it is only granted, and that very rarely too, upon particular reasons, and for particular purposes (a), to prohibit a single person from departing the kingdom, and not so many men as were going this voyage to trade beyond the seas.

SECONDLY, The defendant in this action might as well have impounded a man's cattle till he give security not to commit a trespass; he might as well have levied money before judgment, or seized before a trial or conviction, which is very like this case; so that what he did cannot be lawful: and the finding of the charter is not material; for if by that they had any power to stop the ship, then there had been no need of petitioning the council.

Neither can it be doubted whether this is a *prosecution* within the meaning of the act, for the preferring of a petition was intermeddling with a thing not done upon the high sea; there was an advocate and proctor; there was an allegation and surmise of the matter of complaint; then a prayer that the Court would make a decree against the ship; then there was a judgment, and * a warrant upon it, which was executed; and can it be doubted, after all this, whether it was a judicial prosecution or not? But a *prosecution* it is, and that which is within the meaning of the statute; for the arresting of the ship *infra corpus comitatus*, where the admiral can have no jurisdiction, is such a prosecution as it is clearly against the statute; for the property of goods, though confiscated, shall not be tried by him, but by the common law; and therefore *Cornero*, a Spaniard, having committed several crimes in Spain, by which he had incurred the forfeiture of his goods, brought them into England, and sold them to Sir John Watts, against whom Don Alonso de Velasco libelled in THE ADMIRALTY, and prayed an attachment of the goods in the hands of Sir John; but a prohibition was granted (b). It is a weak objection to say, that this cannot be a *prosecution* because there was no defendant; for the proceedings in the court of admiralty are against the ship, and the owners usually come in *pro interesse suo*; and it is yet a weaker objection that Mr. Sands is not a party grieved, for the damages are direct, and not consequential; the taking of the ship out of his possession is the cause of the action: neither are all consequential damages rejected by the law, but such

[180]

(a) Fitzg. N. B. 85. See the cases of *Lloyd v. Cardy*, Prec. Chan. 171. and *Ex parte Bruncker*, 3. Peer. Wms. 312. that although this writ has been granted by application on affidavit to the court of chancery, 2. Vezey, 429, yet

it ought not to be granted without a bill first filed. *Rico v. Gualtier*, 3. Atk. 501. 2. Com. Dig. "Chancery" (4. B.). 4. Bac. Abr. 168.

(b) Hobart, 212.

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against
CHILD.

only which are far off, and such of which there is no certainty whether they may happen or not.

* [181]

LASTLY, *Mr. Sands* alone may bring this action, because he had the ship in his possession, and therefore was the principal; and though the property of the goods was in several men, yet none had a right to the ship except himself. It is true, merchants have a several interest in their goods, and may therefore have several remedies, but the master alone has a right to the ship. By the statute of 1. & 2. *Philip and Mary*, c. 12. the penalty of five pounds is given where a distress is taken and driven above three miles out of the hundred; if the cattle of three men are distrained and drove out of the hundred, &c. each of them shall have an action for five pounds. The case of *Dominjo Bylota* (a) something resembles this, viz. Two men bought a ship of him at land, and sued him upon the contract in the admiralty court, and for this offence he brought an action against one alone, and it was held good; but the case of *Swanton v. Willett*, there cited, is directly to the point; which was thus: Two men sued in THE ADMIRALTY for a cause arising at land; the king and * one of the persons grieved brought an action against one of the prosecutors, without shewing the death of his companion; and the judgment was, that the party grieved *recuperet damnum et quod defend. pœnam 10 erga regem per statut. prædict. incurrat et capiat, et quod dominus rex recuperet versus defend. 10l. et capiat* (b); in which case both the costs and damages are doubled. But it is in no sort like the case of *Boson v. Sandford* (c), lately adjudged in the court of king's bench, which was this: An action was brought against the defendant, for that he and seven other persons were proprietors of a vessel which used to carry goods for hire, and that the plaintiff's goods were damaged by the negligence of the defendant, who was one of the proprietors, against whom alone the action was brought; there it was held, that though there was no actual contract between the plaintiff and the part-owners, yet they all having an equal benefit, and the ground of the action arising upon a trust which supposes a contract, the action ought not to be brought against one, but all. But this action arises upon a trespass, and not upon a contract, in which one may sue alone without joining his partners, and in which consequential damages may be given, as loss of time, &c.: as, if an action of battery should be brought for breaking of a leg, it is not necessary to give in evidence that the party cannot go, because it is the consequence of breaking; therefore such damages which were given here are of immediate consequence, and within the statute, for which the party ought to be relieved, as well as for the taking of the ship.

Then as to the action being brought against the agents, and not against THE COMPANY, it is well enough, because it is impossible to

(a) Dyer. 159. b.

(b) 1. Leon. 282. 8. Co. 115. Cro. Eliz. 582.

(c) 3. Mod. 321.

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sue THE COMPANY ; for it does not appear that they were concerned in this *prosecution*, or that it was done by their order. And though they acted as agents or attornies, yet they must take care to do what is lawful ; and here even THE COMPANY itself could not justify this *prosecution*, neither shall their attorney or agent.

SANDS
against
CHILD.

Afterwards, in *Michaelmas Term*, THE JUDGMENT was affirmed.

BUT PER CURIAM, the partners ought to have been joined with the plaintiff in this action ; which not being done, the defendant might have pleaded it in *abatement* (a), and averred that they were living at the time of the action brought, which had been a good plea.

But this likewise was omitted, and therefore the plaintiff had his judgment.

(a) 1. Salk. 290. 2. Lev. 113. Stra. 820. 5. Burr. 2611.

* [182]

* Hinks against Harris,

Case 715

THE DEFENDANT married one sister who died, and afterwards he married the other, by whom he had issue. He was prosecuted in the archdeacon's court of *Litchfield* for an incestuous marriage. Pending that suit his second wife also died ; so that, according to *Kenn's Case* (a), all prosecution in the ecclesiastical court ought to cease ; for after the death of either of the parties before a divorce they cannot proceed there to declare the marriage void, and bastardize the issue. But notwithstanding that authority, sentence was given in this case declaring the marriage to be void.

If a man marry his wife's sister, the ecclesiastical court cannot proceed to bastardize the issue after the death of either of the parties, on the ground of the marriage being incestuous.

And upon a motion in the court of king's bench for a prohibition, cause was shewn why it should not go, viz. because this was an offence of ecclesiastical cognizance, and that court had the proper jurisdiction over it. *Kenn's Case* is, that no proceedings shall be in order to a divorce where both parties are dead ; but here is one living who may defend the suit.

S. C. 2. Salk. 548.
S. C. Carth. 271.
S. C. Comb. 200.
S. C. 12. Mod.

E contra. There is no occasion for a divorce, when the death of one of the parties has determined the marriage ; but the consequence of this proceeding is to bastardize the issue. The incest may still be determinable in that court, but then the marriage must not be declared void ; let the party be punished if the marriage was incestuous, but *quoad* the sentence of divorce a prohibition was prayed.

35.
1. Roll. Abr. 360.
1. Salk. 121.
Cro. Jac. 186.
Co. Lit. 32.
7. Co. 70.
5. Co. 98.
3. Bac. Abr. 582.

A prohibition was granted *nisi*,

(a) 7. Co. 44.

Easter Term, 5. William & Mary, In B. R.

Cafe 72.

Dixon against Terry.

Hilary Term, 4. Will. & Mary, Roll 848.

General releases
to the day of the
date does not
release a battery
committed on
that day.

TRESPASS, ASSAULT, AND BATTERY. The defendant pleaded a *general release* of all actions, &c. from the beginning of the world *usque ad diem datus* of the said release.

It happened that the battery was done upon that very day on which the release was dated.

Cro. Eliz. 897.

Owen, 50.

3. Salk. 171.

5. Com. Dig.

"Pleader"

(3. M. 12.).

So that IT WAS HELD, that this action was not discharged; for the release did not include that day. The defendant should have traversed (a) all, &c. after the day of the date of the release.

* [183]

(a) See Creed v. Lappin, Fort. 359.

Cafe 73.

* De la Bastide against Reynell and his Wife.

After appearance to a *capias* in *withernam* the defendant may plead *non cepit*, and be admitted to bail; for he is not bound by the return of *elongavit*.

UPON A WRIT de homine replegiando the sheriff returned *elongavit*. Thereupon a *capias in withernam* issued forth. Then the defendants entered an appearance with THE PHILAZER.

A motion was made for a *superfedeas* to the *withernam*, and that they would plead *non ceperunt*; for they are not to be concluded by the return of the sheriff, which was traversable.

This was opposed, unless they would give bail to deliver the person in case the issue should be found against them.

S. C. Carth.

286.

S. C. Comb. 200.

S. C. 12. Mod.

36.

2. Mod. 199.

1. Sid. 81.

2. Show. 219.

232.

CURIA. There is no difference between a common *replevin* and an *homine replegiando* as to this matter; neither is there any other return to this writ than *elongavit*, which is, that the party cannot be found. If the defendants had claimed any property, then they are to *gage deliverance*; but that is not done, for they say they have not the person: therefore let them plead *non ceperunt*, and put in bail to appear *de die in diem*.

Cafe 74.

Wharton against Lisle,

Hilary Term, 3. Will. & Mary, Roll 56.

Flax, from its nature, is *small tithable*; and therefore if

TROVER AND CONVERSION for the taking of twenty cart-loads of flax, oats, and wheat, &c.

twenty six acres out of five hundred acres in a

Upon not guilty pleaded, the jury find as to the *oats* and *wheat* not guilty; and as to the *flax* they find specially, viz. that the plaintiff was impropriator of the parish-church of *Thorpe* in the

parish be sown with flax, it shall not from its quantity be considered as *great tithable*.—S. C. 3. Lev. 365. S. C. Comb. 201 209. S. C. Carth. 163. S. C. Skin. 341. 356. S. C. 3. Salk. 349. S. C. 12. Mod. 41. 1. Roll. Abr. 633. 643. Cro. Eliz. 467. Cro. Car. 28. Hutton, 73. Moor, 99. 909. Owen, 74. Palm. 220. Wood's Inst. 162. 3. Com. Dig. "Dissent" (G. 2.).

county

Easter Term, 5. William & Mary, In B. R.

county of *Essex*, and that all THE GREAT TITHES arising there have been usually paid to him; that the defendant was vicar there, and had all THE SMALL TITHES in the said parish; that in the year 1691 there were six hundred and fifty acres of arable land sown in the said parish with all sorts of grain, whereof twenty acres were sown with flax; that on the fifth of *June*, in the third year of *William the Third*, the lands being so sown, and the tithes set out, the defendant carried them away, &c.

WHARTON
against
Lisle.

The question was, Whether the tithes of flax were great or small tithes?

* ROTHERHAM, *Serjeant*, for the plaintiff, argued, that these are great tithes. At the common law there is no such person known as a vicar; the parson had all the tithes. Vicarages began, in the reign of *Henry the Third*, by a constitution of POPE URBAN THE EIGHTH. Afterwards the vicars became spiritual persons. Before the statute of *Westminster the Second* (a), a *quare impedit* would not lie for disturbing a patron to present to a vicarage; and till the statute of 14. *Edw.* 3. c. 7. a vicar could not maintain a *juris utrum* against the patron. When he is entitled to tithes, it must be by endowment or prescription; it cannot be by endowment in this case, because the jury have not found it so: besides, flax was not sown in *England* at the time when the first statutes (b) were made for endowing of vicarages. Neither can this vicar prescribe to have these tithes, because the parson had them one year, and the vicar for seven years past. Now admitting that the tithes of flax are in themselves *minutæ decimæ*, yet when it is sown in great fields, and in large quantities, it loses that quality, and favours of the nature of great tithes.

[184]

2. Roll. Rep. 97.

E contra. Flax is an herb in its nature, and so it was adjudged in *Noah Webb's Case* (c). The quantity of land on which it is sown cannot alter the nature of the thing, either to make it great or small tithes; for if a whole field should be sown with *saffron*, the tithes thereof would be but *minutæ decimæ*, for it grows in the nature of an herb; and it is that which, together with custom and usage, and not by the husbandry of the land, makes it small tithes (d).

DOLBEN, *Justice*. If wheat be sowed in a garden, the parson shall have tithes, and not the vicar; and if flax be sowed in a field, the vicar shall have the tithes, because of the nature of the thing.

Quod fuit negatum per alios; for pease and beans when sown in a garden yield only small tithes, but when in large fields it is otherwise; and upon this difference, viz. when a little land, or great part of a parish, is sown with things of this nature, the tithes from thence arising are either great or small; and it is upon this reason that hops in *Kent* have altered the quality of the thing, because they are planted there in great quantities.

(a) 13. *Edw.* 1. c. 5. See 2. *Inst.* 357.

(b) 15. *Rich.* 2. c. 6. 4. *Hen.* 4.

a 12.

(c) 1. *Roll. Abr.* 643.

(d) *Cro. Car.* 28.

Afterwards,

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WARTON
against
Lisle.

Afterwards, in *Trinity Term*, judgment was given for the defendant by THREE JUDGES, *absente* HOLT, *Chief Justice*, who was of opinion, that the sowing of flax in large fields makes the tithes thereof great tithes (a).

(a) By 11. & 12. Will. 3. c. 16. made perpetual by 1. Geo. 1. c. 26. f. 2. all persons who shall sow any hemp or flax in any parish or place in England, Wales, or Berwick, shall pay to the parson, vicar, or impropriator, of such parish

or place, yearly, the sum of five shillings, and no more, for each acre of hemp and flax so sown before the same be carried off the ground, and so proportionably for more or less ground so sown.

• [185]

Case 75.

• *Barkdale against Morgan.*

In the Common Pleas.

On a covenant to pay such a sum of money "within one month next following," the month shall be reckoned a lunar month of twenty-eight days, and not a calendar month. Ante, 95.

Co. Lit. 135.
2. Roll. Abr. 521.
Cro. Jac. 167.
Skin 314.
Cro. Eliz. 835.
Hob. 179.
Lit. Rep. 19.
3. Mod. 58.

COVENANT. A special verdict was found, in which the case was as follows :

In consideration of twenty guineas paid by the plaintiff to the defendant on such a day, &c, he covenanted, &c. upon payment of five hundred pounds more within one month next following, upon notice, to transfer to him certain shares in the *East-India Company*. The plaintiff averred, that he did tender the five hundred pounds within a month, &c. The defendant pleaded, that the plaintiff did not tender the five hundred pounds within a month, for that before such tender twenty-eight days were past from the day of the date of the agreement,

The truth was, he did tender the five hundred pounds after the *twenty-eight days*, but within a *calendar month*, and it was so found by the jury.

The question, therefore, was, What shall be intended a *month* within this agreement ?

Those who argued for a *calendar month* insisted, that the statute of 13. Hen. 4. c. 7. gives the justices power within *one month* next after a riot committed to enquire into the same, and that it had been held (a), they may make such enquiry after the twenty-eight days ; which shews that the parliament intended a *calendar month*. And as such a month was intended by them, so this Court may judicially take notice of such a month ; and therefore a judgment being obtained in an inferior court, the error assigned was, that it was given at a court held on the sixteenth day of *February*, which was *Sunday* ; and the question being, Whether this matter should be tried by a jury, or by the almanacks of the year ? it was held sufficient to examine it by almanacks ; and the Court was informed by them (b).

E contra. The words in this agreement "to pay five hundred pounds within a *month* next following" shall be accounted the next

(a) 1. Sid. 186.

(b) Page 7. *Faucet*, Cro. Eliz. 227.

S. C. 1. Leon. 242.—See the case of *Swan v. Brome*, 5. Burr. 1596.

OF

Easter Term, 5. William & Mary, In C. B.

or nearest time to the day of the agreement, which must be twenty-eight days. So it is in a bond dated on the first of *May*, with a condition to pay money on the fifteenth day of *May* "next ensuing;" these last words shall refer to the fifteenth day of the same month (*a*), and not to the month itself, which would be a year afterwards: and regularly a month is accounted no more * than twenty-eight days (*b*), unless it be in a *quare impedit*, and there a few days more are allowed on purpose to save a lapse. It is likewise so in a lease rendering rent at the two most usual Feasts in the year, or within a month after; and if it be behind by the space of eight weeks, then, &c. these eight weeks shall be reckoned according to twenty-eight days (*c*).

BARKSHALE
against
MORGAN.

* [1816]

CURIA. In common parlance *the month* is taken to be *twenty-eight days* in all cases except in a *quare impedit*, and therefore it must be so many days according to the common and known acceptation of the word. And to prove this some cases were offered; as where a promise was to deliver an indenture before the end of *Trinity Term* next ensuing, and this promise happened to be made on the fifth of *June*, and the Term began two days after, but the essoin-day was two days before the promise made; now though that day in law is the first day of the Term, and so the delivery of the indenture was not to be till *Trinity Term* a year afterwards, yet in common speech the first day of the Term is when the Judges sit, and so the delivery of the indenture was adjudged to be made that very *Trinity Term* in which the promise was made. And as words and phrases of speech are to be expounded and construed as they are generally understood, so it is likewise in particular places; and therefore if I covenant to convey to another an acre of land in *Cornwall*, the common acceptation of the word "acre" there amounts to as much as a hundred of other counties; so "a perch" in *Staffordshire* is as much as twenty perches in some other places; therefore such words must be governed by the common and known acceptation of the people. By the statute of 2. *Edw.* 6. c. . the suggestion on a prohibition ought to be proved within *six months* next after the prohibition granted; the computation must be after the rate of twenty-eight days to the month (*d*).

Manw. Fo. 22
Law, 92.

And so it was held in this case (*e*).

(*a*) *Prescot's Case*, Cro. Jac. 646.; and see the case of *Kettle v. Jones*, in the king's bench, Hilary Term, 5. *Geo.* 2. where it was adjudged, that a bond dated 12 *May*, conditioned to pay a certain sum on the 13 *May* next following should have relation to the month, and not to the day. 3. *Bac. Abr.* 711. *notis.*

(*b*) *Co. Lit.* 135. *Yelv.* 1004. *Cro. Jac.* 166.

(*c*) *Dyer*, 142. 2.

(*d*) *Dormer v. Smith*, Cro. Eliz. 835. *Dr. Clay v. his Chaplain*, Litt. Rep. 19. But see 2. *Roll. Abr.* 521. *Hob.* 179. 2. *Mod.* 58. *contra.* 1. *Com. Dig.* "Ann." page 504.

(*e*) So where by 20. *Geo.* 2. c. 37. a sheriff is to return process within *six months* after the expiration of his office, they shall be accounted *lunar months*, *Rex v. Adderley*, Bougl. 463. So also in a contract to deliver stock, the computation shall be by *lunar months*, *Jocelyn v. Hawkins*, Stra. 446.; and in all legal proceedings, as time to plead, a month is four weeks, *Tullet v. Linfield*, 3. *Burr.* 1455. But if money be lent for nine months, they shall be understood *calendar months*, *Titus v. Preston*, Stra. 652.

Smith

Case 76.

Smith against Kemp.

Trespass vi et armis quare clausum trespas fregit et intravit et liberam piscariam piscatus fuit, et pisces retibus cepit, &c. There was a verdict for the plaintiff.

TRESPASS was brought against the defendant, who was the owner of the soil, *quare vi et armis clausum ipsius* (the plaintiff) *fregit et intravit et liberam piscariam piscatus fuit, et pisces retibus cepit, &c.* There was a verdict for the plaintiff.

A motion was made in arrest of judgment, and these exceptions taken :

* FIRST, That an action of trespass *quare vi et armis, &c.* will not lie against the owner of the soil. It was compared to a free warren in the soil of another, and trespass *quare vi et armis in liberâ warrenâ suâ latibula ejusdem warrenæ prostravit* will not lie: the proper remedy is a special action *on the case* for the wrong done; and so it ought to have been here.

S. C. 2. Salk. 637.

S. C. Carth. 285.

S. C. Skin. 342.

S. C. Holt, 322.

S. C. Eliz. 125.

5. Mod. 375.

Comy. Rep. 34.

1. Salk. 556.

5. Com. Dig. "Pleader" (3. M. 9.).

6. Com. Dig. "Trespass" (A. 2.).

2. Roll. Abr. 250. Yeiv. 36. Cro. Car. 553. Cro. Jac. 46. 262. 195. Cro. Eliz. 125. Owen, 93. 2. Brownl. 192. 1. Sid. 184. 187. 3. Lev. 227. 2. Lev. 20. 5. Mod. 375. Comy. Rep. 34. 1. Salk. 556. 5. Com. Dig. "Pleader" (3. M. 9.). 6. Com. Dig. "Trespass" (A. 2.). 2. Roll. Abr. 550.

Quærs, If trespass lies for taking fish in a free fishery?

SECONDLY, It does not lie for taking fishes in *liberâ piscariâ*. To fish in *liberâ piscariâ* is the same thing as to fish in *communi piscariâ*; and a commoner cannot bring an action of *trespass* for any thing done upon the common.

CURIA. In the reign of *Edward the Third* (a) the like action was brought for fishing in *liberâ piscariâ*; and it does not appear by the book but the action was maintainable; but if it be a fault, it is cured by *the verdict*; and it shall now be intended that they were the plaintiff's own fish (b).

(a) Year Book 46. *Edw.* 3. pl. 11.

Fontleroy v. Aylmer, 1. Ld. Ray. 239.

(b) See *Holland's Case*, 2. Lev. 156.

Sutton v. Mowly, 1. Ld. Ray. 250.

Case 77.

Bowden against Shaw.

Indebted on bond for the discharge of a person in custody on *mesne process*, if the defendant plead *23. Hen. 6. c. 10.* ABSQUE HOC that he was at large at the time, the *traverse* is immaterial, but good on general demurrer.—Cro. Car. 328. Cro. Eliz. 555. 842. Co. Lit. 282. 1. Leon. 39. Hard. 69. 2. Vent. 211. 217. 1. Lutw. 382. 5. Com. Dig. "Pleader" (G. 12.).

TWYFORD was indebted to the plaintiff *Bowden* in seventy pounds, for which he was arrested; and being in custody of *Ashby*, a serjeant of the mace in *London*, was discharged at the instance of the defendant *Shaw*, by giving a bond to the said *Ashby* for the use of the plaintiff, that *Twyford* should either render himself, or put in bail at the return of the writ, or pay the plaintiff seventy pounds; which not being done, the plaintiff now brought an action of debt against *Shaw* upon this bond. The defendant pleaded, that the officer took the bond *colore officii* (a), ABSQUE HOC, &c. that *Twyford* was at large at that time.

(a) The Statute 23. *Hen.* 6. c. 10. on which this plea is founded, is declared to be a public act, and therefore need

not now to be specially pleaded, 2. Term Rep. 569.

And

Easter Term, 5. William & Mary, In B. R.

And upon a demurrer it was said, this was an *immaterial traverse*.

Howett
against
Saw.

But admitting it to be so, the plaintiff shall take no advantage of it upon a *general demurrer*; he ought to have *demurred specially*, and shewed it for cause.

* [188]

Then as to the matter IT WAS HELD, that the officer having taken such a bond to enlarge a person without the privity of the plaintiff, who had power either to confine or let him go, it is void; and though it be taken to his use, it is * within the equity of the statute 23. Hen. 6. c. 10.; but it might be otherwise if the bond had been made to *the plaintiff himself* (a).

A bond to render the prisoner, or to pay the debt, given to a sheriff's officer by a third person to the use of the plaintiff at whose

suit the prisoner was in custody, is void by statute 23. Hen. 6. c. 10. though made to the use of the plaintiff.

(a) See the case of Milward v. Clark, where a promise that a debtor in execution should appear at the return of the writ, or that he would pay the debt, made to *the plaintiff* at whose suit the debtor was in execution, in consideration of the plaintiff's ordering the sheriff to let the prisoner go at large, was held good, because made to *the party* who had authority to dispense with his appearance; but the Court agreed, that if the promise had been made to *the sheriff*, or to any other for his use, it would have been void by the equity of the statute, Cro. Eliz. 190. So also a bond in consideration of enlarging a prisoner given to *the plain-*

niff is good, though in a different form than prescribed by 23. Hen. 6. c. 10. Hall v. Carter, 2. Mod. 304.—The undertaking of an attorney also for the appearance of a defendant is good, because it is given to *the plaintiff*, and not to *the sheriff*, Rogers v. Reeves, 1. Term Rep. 418. But an agreement in writing to put in good bail for a person arrested on *mesne process* at the return of the writ, made by a *third person* with *the bailiff* of the sheriff, in consideration of his discharging the party arrested, is, on this reason, void, because it is given to the sheriff, Rogers v. Reeves, 1. Term Rep. 418.

Knight against Keech.

Case 78.

Easter Term, 3. Will. & Mary, Roll 374.

THE CASE was thus:—There were mutual promises and agreements between the plaintiff and defendant, which were *specially* set forth in the declaration, in which the plaintiff alleged *generally*, that the defendant *non performavit agreementum suum prædictum*, without shewing a particular breach. There was a verdict and judgment for the plaintiff in the common pleas.

Where there are mutual promises and agreements *specially* stated in the declaration, a breach assigned generally, "that the defendant had not performed the agreement on his part," is good after *verdict*, but bad on demurrer.

A WRIT OF ERROR was now brought; and it was assigned for error, that the breach was too general, which being matter of substance the right of the action could not be tried, and therefore it is not within any of the statutes of *Jeofails*. To prove this many cases were cited which resembled this, *viz.* that "*non performavit agreementum*" could not be good without shewing wherein; as in consideration that he would relinquish rent due, a promise was made to pay thirty pounds, and an allegation *in fact*o that he did relinquish the rent, but because he did not shew how,

S. C. Comb. 204.
S. C. Carth. 271.

S. C. Holt, 53. S. C. Skin, 344. S. C. 3, Lev. 319.
the

Knight
against
Keech,

the judgment was arrested (*a*). So where a horse was bought for a piece of gold in hand, and eleven pounds more to be paid at the death or marriage of the plaintiff, for which he was to be bound with sufficient sureties, and thereupon the defendant promised to deliver the horse; the plaintiff offered to be bound; but because he did not aver that he tendered a bond ready sealed, &c. that so it might appear that both he and his sureties were bound in a competent sum, the judgment was likewise arrested (*b*). Many more instances may be given where the plaintiff must shew the precise consideration agreed on to be performed; as if a promise should be made that in case the plaintiff would acquit a man of a hundred pounds due the defendant would pay the money; now though it be alledged *in fact* that he did acquit him, it is not sufficient without shewing *how* (*c*). So a promise to pay money before the plaintiff began his next journey to London, and he alledged that he began his journey on such a day; but because he did not aver that to be the next journey after the promise, *nil capiat per billam* (*d*).

• [189]

* *E contra*. There is no form in the Register prescribed to an action on the case; for if there be sufficient matter disclosed in the declaration, to which the defendant ought to answer, it is well enough. This is a negative, *viz.* *non performavit*, and so not like those cases of affirmative promises or covenants where the breach must be averred. Besides, in this case the plaintiff could not have a verdict if the non-performance of the agreement had not been fully proved. Goods were delivered to a person, and the defendant promised that he would warrant all the money that was owing for them; the breach was for *non-payment* of the money; and although it was objected it should be for not warranting, yet it was held well enough (*e*). So if a promise be of a thousand pounds "to save another harmless" from an escape, and the breach assigned be for "not saving harmless," which is the gift of the action, without saying that he had not paid the thousand pounds (*f*):

At another day THE JUDGMENT was affirmed upon these authorities following, *viz.* Debt was brought upon a lease, in which the defendant was bound to perform several covenants, or otherwise to forfeit so much, &c. the breach assigned was, that he had broke all the covenants, and did not shew any particular breach, which is a harder case than this; and yet it was held good (*g*). If promises be executory on both sides, performance need not be averred, because it is the counter-promise, and not the performance, that raises the consideration; and therefore where the plaintiff promised to deliver a cow to the defendant, and he promised to pay him fifty shillings, it was held that the plaintiff need not aver the delivery of the cow, because without such averment a promise against a promise made at one and the same time is a sufficient ground for an action (*h*).

(*a*) Gregory v. Nevil, Cro. Eliz. 292.

(*b*) Hob. 57.

(*c*) Leneret v. Rivet, Cro. Jac. 503.

See also Langden v. Stote, Cro. Car. 383.

And Prideaux v. Rawlins, 2. Show. 27.

(*d*)

(*e*) 1. Sid. 178.

(*f*)

(*g*) Year Book 3. Hen. 6. pl. 8.

Dyer, 297. b.

(*h*) Cro. Eliz. 543. Hob. 38. 106.

And

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And for a latter authority this case was remembered (a) : There was an agreement between the plaintiff and defendant, that the plaintiff should pull down old walls, and build a malt-house, and that the defendant would pay him eight pounds *pro labore suo* ; the plaintiff averred, that after the agreement *paratus fuit et obtulit performare, &c.* and he had a verdict ; and this was held good enough after a verdict, without averring performance of the work. And therefore upon these authorities, and because the promises in this case were *mutual*, the breach was held to be well assigned.

KNIGHT
against
KNIGHT.

And thereupon judgment was given for the plaintiff (b).

(a) 2. Saund. 351.

(b) The Court said, that this objection might be good upon *demurrer*, but that the plaintiff in the original action was helped by the verdict, for it shall be in-

tended that some particular breach was given in evidence to the jury ; for that otherwise the plaintiff could not have recovered a verdict. S. C. Carth. 272. S. C. Skin. 344.

* The King and Queen against the Bishop of London and Dr. Lancaster.

* [190]
Cafe 79.

HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER Sacrae Theologiae Professor summoniti fuerunt ad respondendum domino regi et dominae reginae nunc de placito quod permittunt ipsos dominum regem et dominam reginam praesentare idoneam personam ad vicariam ecclesiae Sancti Martini in Campis quae vocat et ad suam spectat donationem &c. Et unde JOHANNES SOMMERS miles attorn. dictorum domini reg. et dominae reginae nunc generalis qui pro eisd. domino rege et domina regina sequitur pro eisdem domino rege et domina regina dicit quod quidam HUMFRIDUS nuper EPISC. LONDON. fuit seisis. de ad-vocatione vicariae ecclesiae paroch. Sancti Martini in Campis praed. ut de uno grosso per se ut de feodo et jure in jure episcop. sui praedict. Et sic inde seisis. existen. ipse praedict. nuper episcopus eo quod eadem vicaria fuit in diocesi sua LONDON. eandem vicariam vacantem contulit THOMAE LAMPLUGH Sacrae Theologiae Professori Clerico suo, qui vir-tute collationis illius in corporal. possession. ejusdem vicariae posit. fuit tempore pacis tempore DOMINI CAROLI SECUNDI nuper regis Angli. &c. Eodemque THOMA vicar. vicariae praed. ut praefertur existen. idem THOMAS LAMPLUGH postea in EPISCOPUM EPISCOPATUS EXON. rite et canonice creat. et consecrat. fuit et vicaria praed. vacavit per promotionem dicti THOMAE LAMPLUGH ad praed. EPISCOPAT. EXON. per quod ad eundem nuper REGEM CAROLUM SECUNDUM ratione praerogativae suae regiae coronae suae Angli. annex. idoneam personam ad vicariam praed. sic vacantem pertinuit praesentare ; per quod praed. nuper REX CAROLUS SECUNDUS ratione praerogativae suae regiae praed. ad vicariam praed. tunc sic vacantem praesentavit WILLIELMUM LLOYD Sacrae Theologiae Professorem Clericum suum qui ad eandem praesentationem ipse nuper regis fuit admissus institut. et induct. in eadem tempore pacis tempore dicti nuper regis. Eodemque WILLIELMO LLOYD vicario vicariae praed. ut praefertur existen. idem WILLIEL. LLOYD postea in EPISCOPUM EPISCOPAT. ASAPHEN. rite et canonice creat. et consecrat. fuit et vicaria praed. vacavit per promotionem praed.

Middlesex, S.
Quare impedit.

Lilly, 342.

The late Bishop of London seized ut de uno grosso jure episcopatus,

and collated.

The parson made a bishop.

The king grants by his prerogative to another ; who was instituted and inducted ;

THE KING
AND QUEEN
against
THE BISHOP OF
LONDON AND
DR. LANCASTER.

which parson
presented was
afterwards made
a bishop,

and the king
presented another,

who was instituted
and inducted:

which parson
was afterwards
made a bishop,
and the king
was hindered in
his presentation.

*præd. WILLIELMI LLOYD ad præd. EPISCOPAT. ASAPHEN. per
per quod ad eundem nuper * REGEM CAROLUM SECUNDUM ratione
prærogativæ suæ regis coronæ suæ Angliæ annex. idoneam personam
ad vicariam præd. sic vacantem pertinuit præsentare; per quod præd.
nuper REX CAROLUS SECUNDUS ratione prærogativæ suæ regis
præd. ad vicariam præd. sic tunc vacantem præsentavit 1 HOMAM
TENNISON Sacræ Theologiæ Professore Clericum suum qui ad eandem
præsentationem ipsius nuper regis fuit admissus instituit. et induet. in
eadem tempore pacis tempore dicti nuper regis. Eodemq. THOMA TEN-
NISON vicario vicariæ præd. ut præfertur existens. idem THOMAS TEN-
NISON postea in EPISCOPUM EPISCOP. LINCOLN. ritè et canonicè
creat. et consecrat. fuit et vicaria præd. vacavit per promotionem dicti
THOMÆ TENNISON ad præd. EPISCOP. LINCOLN. et adhuc vacans
existit; per quod ad ipsos dominum regem et dominam reginam nunc
ratione prærogativæ suæ regis prædictæ idoneam personam ad vici-
ariam præd. sic vacantem ad præsens pertinet præsentare. Et prædicti.
HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER
ipsos dominum regem et dominam reginam nunc injussè impediunt ad dan-
dum ipsorum domini regis et dominæ reginæ nunc quingentarum libra-
rum. Et hoc idem attorn. dictorum domini regis et dominæ reginæ nunc
generalis qui &c. pro eisdem domino rege et domina regina paratus
est verificare, &c.*

Placitum.

The defendants
pray oyer of the
writ.

*Et præd. HENRICUS EPISCOPUS LONDON. et WILLIELMUS
LANCASTER per ADAM BAYNES attorn. suum ven. et defend. vim
et injur. &c. et petunt auditum brevis præd. et eis legitur in hæc verba,
scilicet, "GUILLIELMUS et MARIA Dei gratiâ Angl. Scotiæ Franciæ
& et Hiberniæ rex et regina, fidei defensor. &c. vic. Middlesex salut.
" Præcipe HENRICO EPISC. LONDON. et WILLIELMO LANCASTER
Sacra Theologiæ Professori quod justè et sine dilatione permit-
tant nos præsentare idoneam personam ad vicariam ecclesiæ Sancti
Martini in Campis quæ vacat et ad nostram spectat donationem, et un-
de præd. EPISCOPUS et WILLIELMUS nos injussè impediunt ut
dicitur; et nisi fecerint sum. per bonos sum. præd. EPISCOPUM et
WILLIELMUM quod sint coram nobis à die Sancti Michaelis in tres
septimanas ubicunq. tunc fuerimus in Angl. ostens. quare non fece-
rint, et habeas ibi sum. et hoc breve. Teste nobis ipsis apud Westm.
" 26 die Septembris, anno regni nostri quarto CÆSAR:" quo lecto et
audito iidem EPISCOPUS et WILLIELMUS petunt judicium de brevi et
narratione præd. quia dicunt quod inter breve et narration. præd. ma-
terialis habetur variatio in hoc, * videlicet, quòd ubi per breve præd.
prædicti dominus rex et domina regina intitulant se ad donationem præd.
vicariæ ecclesiæ Sancti Martini in Campis pleno jure, tamen per nar-
ration. præd. iidem dominus rex et domina regina intitulant se ad dona-
tionem ejusdem vicariæ ratione prærogativæ suæ regis coronæ suæ An-
gliæ, unde pro variatione præd. inter breve et narration. præd. iidem
EPISCOPUS et WILLIELMUS petunt judicium de brevi et narration.
præd. et quòd breve ill. cassetur, &c.*

Moratio in lege
ad placitum.

*Et præd. attorn. dictorum domini regis et dominæ reginæ nunc general.
qui pro eisdem domino rege et domina regina nunc sequitur pro eisdem do-
mine*

mino rege et domina regina dicit quod præd. placitum præd. HENRICI EPISCOPI LONDON. et WILLIELMI LANCASTER in cassatione brevis præd. superius placitat. materiâq. in eodem content. minus sufficien. in lege existunt ad breve præd. cassand. quodq. ipse idem attorn. general. &c. pro eisdem domino rege et domina regina ad placitum illud modo et formâ præd. placitat. necesse non habet nec per legem terræ tenetur respondere. Et hoc idem attorn. general. &c. pro eisdem domino rege et domina regina parat. est verificare; unde pro defectu sufficien. responsi ipsorum EPISCOPI et WILLIELMI in hac parte idem attorn. generalis &c. pro eisdem domino rege et domina regina pet. iudicium et quod breve præd. bonum adjudicetur et breve Episcopo, &c.

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I

Et præd. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER dicunt quod præd. placitum ipsorum HENRICI EPISCOPI LONDON. et WILLIELMI LANCASTER in cassatione brevis præd. superius placitat. materiâq. in eodem content. bonum et sufficien. in lege existunt ad breve præd. cassand. unde ex quo præd. attorn. dict. domini regis et dominæ reginæ nunc general. ad placitum illud non respond. nec ill. aliquid aliter deduc. iidem HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER (ut prius) petunt iudicium de brevi et narratione prædict. et quod breve illud cassetur, &c. Sed quia curia dictorum domini regis et dominæ reginæ nunc hic de iudicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est tam præfat. attorn. general. &c. quam præfat. HENRICO EPISCOPO LONDON. et WILLIELMO LANCASTER coram domino rege et domina regina usq. à die Paschæ in quinque septimanas ubicunq. &c. de iudicio suo de et super præmissis ill. audiend. eò quod curia dictorum domini regis et dominæ reginæ nunc hic inde nondum * &c. Ad quem diem coram domino rege et domina regina apud Westm. ven. tam EDWARDUS WARD ar. modò attorn. domini regis et dominæ reginæ nunc general. qui pro eisdem domino rege et domina regina in hac parte sequitur in propria persona sua quam prædict. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER per attorn. suum præd. super quo visis et per curiam dict. domini regis et dominæ reginæ nunc hic plenius intellexis omnibus et singulis præmissis maturaq. deliberatione inde habita pro eò quod videtur curiæ dict. dominæ regis et dominæ reginæ nunc hic quod præd. placit. præd. HENR. EPISC. LOND. et WILLIELMI LANCASTER in cassatione brevis præd. superius placitat. materiâq. in eodem content. minus sufficien. in lege existunt ad breve prædict. cassand. consideratum est quod præd. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER ad breve prædict. respond. &c. Super quo prædict. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER per prædict. ADAM BAYNES attorn. suum ven. et defend. vim et injur. quando &c. et dicunt quod prædict. dominus rex et domina regina actionem suam præd. inde versus eos habere seu manutenere non debent quia idem EPISCOPUS dicit quod narratio præd. materiâq. in eadem content. minus sufficien. in lege existunt ad ipsos dominum regem et dominam reginam ad actionem suam præd. inde versus ipsum episcopum habend. manutenend. quodq. ipse ad narrationem præd. necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc par.

Junio in narratione.

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Judgment quod resp. ouster.

Episcopus moratur in lege est narr.

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The other defendant pleads
ouster.

Confess the seizure of the late
bishop,

and the collation,

* [194]

and the making of the person
collated a bishop,

and the king's presentation of
the others, with their institution
and induction,

and pleads the
statute of 25.
Hen. 8.

The bishop rises
et debito clatus.

rat. est verificare; unde pro defectu sufficien. narrationis in hac parte idem. HENRICUS EPISCOPUS LONDON. petit iudicium et quod præd. dominus rex et domina regina ab actione sua præd. versus ipsum episcopum habend. præcludantur, &c.

Et præd. WILLIELMUS LANCASTER dicit quod ipse est vicarius vicariae Sancti Martini in Campis ex collatione præd. HENRICI EPISCOPI LONDON. quodq. dict. dominus rex et domina regina action. suam præd. inde versus eum habere non debent; quia dicit quod bene et verum est quod præd. HUMFRIDUS nuper EPISCOPUS LONDON. in narratione præd. nominat. fuit scilicet. de advocacione vicariae ecclesiae parochialis Sancti Martini in Campis præd. ut de uno grosso per se ut de feodo et jure in jure episcop. i. sui præd. Et sic inde existit. ipse præd. nuper episcopus eo quod eadem vicaria fuit in diocesi sua LONDON eandem vicariam vacan. contulit THOMÆ LAMPLUGH Sacrae Theologiae Professor. Clerico suo, qui virtute collationis illius in corporal. * possession. ejusdem vicariae posuit. fuit tempore pacis tempore DOMINI CAROLI SECUNDI nuper regis Angliæ, &c. Eodemque THOMA vicar. vicariae præd. ut præfertur existit. idem THOMAS LAMPLUGH postea in EPISCOPUM EPISCOPAT. EXON. rite et canonice creat. et consecrat. fuit et vicaria præd. vacavit per promotionem dicti THOMÆ LAMPLUGH ad præd. EPISCOPATUM EXON. quodq. præd. nuper REX CAROLUS SECUNDUS ad vicariam præd. tunc sic vacan. præsentavit WILLIELMUM LLOYD Sacrae Theologiae Professorum Clericum suum, qui ad eandem præsentationem ipsius nuper regis fuit admissus institut. et inductus in eandem tempore pacis tempore dicti nuper regis. Eodemq. WILLIELMO LLOYD vicar. vicariae prædictæ. ut præfertur existit. idem WILLIELMUS LLOYD postea in EPISCOPUM EPISCOPAT. ASAPHEN. rite et canonice creat. et consecrat. fuit et vicaria prædictæ. vacavit per promotionem præd. WILLIELMI LLOYD ad præd. EPISCOPAT. ASAPHEN, quodq. præd. nuper REX CAROLUS SECUNDUS ad vicariam præd. sic tunc vacan. præsentavit THOMAM TENNISON Sacrae Theologiae Professorum Clericum suum, qui ad eandem præsentationem ipsius nuper regis fuit admissus institut. et inductus in eandem tempore pacis tempore dicti nuper REGIS CAROLI SECUNDI modo et forma prout per narration. præd. superius supponitur. Sed idem WILLIELMUS ulterius dicit quod per quendam actum in parlamento domini HENRICI nuper regis Angliæ octavi apud Westm. præd. 15. die Januarii anno regni sui 25. tent. edit. inter alia inactitat. fuit autoritate ejusdem parlamenti quod neque dictus nuper rex hæredes neque successores sui regis hujus regni nec aliquis subditus (Here recite the statute of 25 H. 8. cap. 21. from the 3d to the 7th paragraph) prout per eundem actum inter alia plenius apparet. Et idem WILLIELMUS ulterius dicit quod post confessionem actus præd. et alio ante impetration. brevis originalis præd. prædictæ. HENR. modo def. rite et canonice creat. et consecrat. fuit in EPISCOPUM EPISCOPAT. LONDON. scilicet apud Westm. prædictæ. quodq. postea et ante impetration. ejusdem brevis scilicet 20. die Decembris anno Domini 1691. præd. THOMAS TENNISON rite et debito modo electus fuit in EPISCOPUM EPISCOPAT. LINCOLN. videlicet apud Westm. prædictæ. quodq. JOHANNES providentia

providentia divina CANTUAR. archiepiscopus totius Angliæ primas et metropolit. post edition. actus prædict. et ante impetration. brevis prædict. scilicet 22. die Decembris anni Domini ultimo supradicto post debitam examinationem archiepiscopum hic de causis et * qualitatibus per præd. episcopum elect. per quasdam litteras suas dispensation. script. secundum formam præd. statuti supra recitat. edit. sub nomine ipsius archiepiscopi confect. ac sigillo ipsius archiepiscopi sigillat. ac in curiæ cancellaria dictorum regis et reginæ nunc apud Westm. præd. debito modo irrotulat. ac idem THOMÆ TENNISON Sacre Theologiæ Doctori et EPISCOPO LINCOLN. elect. direct. recitan. per easdem litteras dispensation. quod ex parte dict. EPISCOPI LINCOLN. elect. dict. archiepiscopo significat. fuit quod EPISCOPAT. LINCOLN. præd. fructus redditus et proventus adeo tenues et exiles et diminut. fuer. ut dignitati suæ episcopali. istis præsertim temporibus nullo modo sufficerent; unde dictus EPISCOPUS LINCOLN. elect. dicto archiepiscopo humiliter supplicari fecisset quatenus ei de opportuno aliquo sublevamine in præmissis provideri dict. archiepisc. de gratia sua speciali dignaretur petitioni præd. obsecundare volens cum præd. THOMÆ TENNISON EPISCOPO LINCOLN. elect. (juxta voluntatem serenissimi domini nostri REGIS GULIELMI dicto archiepiscopo in hac parte significat.) ut una cum EPISCOPAT. LINCOLN. vicariam perpetuam ecclesiæ paroch. Sancti Martini in Campis et rectoriam ecclesiæ parochialis Sancti Jacobi Westm. in com. Middlesex et diocesi. London quas tunc dictus EPISCOPUS LINCOLN. elect. possidebat usq. primum diem mensis Julii tunc prox. a dat. præd. litterarum dispensation. retinere gaudere habere et in commendam tenere in tam amplis modo et forma quibus antea usq. tempus consecution. litterarum dispensation. præd. dictus EPISCOPUS LINCOLN. electus retinebat et possidebat, eorumque fructus proventus aliæque proficua inde provenientia in ejus proprios usus et utilitates convertere applicare, et de eisdem disponere dictus EPISCOPUS LINCOLN. elect. libere et licite valeret et posset etiam in dictis vicaria et rectoria præd. non resideret, nec ullam moram ibidem traxit legitimam dicto THOMÆ TENNISON Sacre Theologiæ Doctori Episcopo LINCOLN. elect. facultatem et auctoritat. dedit et concessit (quantum in dicto archiepiscopo fuit et jura regni patiebantur) et tenore dictarum litterarum dispensation. gratiose dispensavit canoniciis institutis quibuscunque in contrarium non obstan. Provisio semper quod vicaria perpetua ecclesiæ parochialis Sancti Martini in Camp. et rectoria ecclesiæ paroch. Sancti Jacobi Westm. præd. debet. non fraudarentur obsequiis et animarum curæ in eisdem nullatenus negligenter sed congrue supportentur onera debita et consuet. Provisio etiam * semper quod dict. literæ dispensation. eidem EPISCOPO LINCOLN. elect. non proficerent nisi per litteras patentes regiarum majestatum forent confirmat. prout per easdem litteras dispensation. plene liquet. Et idem WILLIELMUS ulterius dicit quod dominus rex et domina regina nunc postea scilicet 23. die Decembris anno regni sui tertio apud Westm. præd. per litteras suas patentes sub magno sigillo suo Angliæ sigillat. gerem. dat. eisdem die et anno et in curia ipsorum domini regis et domine reginæ cancellariæ apud Westm. præd. secundum formam statuti debito modo de recordo irrotulat. præd. litteras dispensationis et

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A dispensation
by the archbishop.

The dispensation set forth.

To hold in commendam.

Provided

* [196]

The king's confirmation of the commendam by letters patents.

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*singula in eis content. juxta præd. a^lum parlamenti confirmaver. et pro seipsis hæredibus et successoribus suis ratificaver. approbaver. et confirmaver. ita quod dictus reverendus in Christo pater THOMAS EPISCOPUS LINCOLN. elect. in dictis literis dispensationis nominat. omnibus et singulis in eisdem specificat. uti frui et potiri valeret et possit libere et quiete impune et licite secundum vim formam et effectum earundem absque impedimento quocunque, eò quòd expressa mentio de certitudine præmissorum aut de aliis donis sive concessionibus per præd. dominum regem et dominam reginam ante tunc fact. in dictis literis patentibus minime fact. existit. aut aliqua re causa vel materia quacunque in aliquo non obstan. prout per easdem literas patentes plenius apparet. Et idem WILLIELMUS LANCASTER ulterius dicit quod prædict. causa pro qua prædict. literæ dispensation. per præd. archiepiscopum et literæ patentes per prædict. dominos regem et reginam nunc sic ut præfertur fact. fuer. non est contrarium sive repugnans sacre scripturæ et legibus DEI, quodque hujusmodi literæ dispensationis pro similibus causis ante editionem prædict. actus parlamenti usitat. et consuet. fuissent haberi per hujusmodi episcopos subditos dicti domini nuper REGIS HENRICI OCTAVI apud prædict. sedem Romanum. Quodque postea scilicet 25. die Decembris, anno Domini 1691, supra dict. præd. THOMAS TENNISON rite et canonice creat. et consecrat. fuit EPISCOPUS EPISCOPATUS LINCOLN. prædict. videlicet apud Westm. præd. quodque prædictus THOMAS EPISCOPUS LINCOLN. prædict. vigore præmissorum habuit et in suos proprios usus et utilitates convertit applicavit et disposuit omnes et omnimodos fructus proventus aliaque proficua præd. vicariæ ecclesiæ parochial. Sancti Martini in Campis præd. in com. Middese^x usque præd. primum diem mensis Julii tunc prox. à dat. dict. literarum dispensation. præd. videlicet apud parochiam * præd. in com. præd. ad quem quidem diem vicaria illa ecclesiæ præd. secundum limitationem in prædictis literis dispensationis mentionat. vigore præmissorum vacavit, scilicet apud Westm. præd. per quod idem HENRICUS EPISCOPUS LONDON. vicariam illam sic vacantem contulit eidem GULIELMO LANCASTER clerico suo et eum in corporali possessione ejusdem vicariæ poni fecit tempore pacis tempore domini regis et dominæ reginæ nunc scilicet apud Westm. præd. idemque GULIEL. vicar. vicariæ præd. ex collatione præd. HENRICI EPISCOPI LONDON. diu ante impetration. brevis originalis præd. fuit et adhuc existit. Et hoc idem WILLIELMUS parat. est verificare; unde petit judicium si dicti dominus rex et domina regina actionem suam præd. versus ipsum GULIELMUM habere debeant, &c. Cum hoc quod præd. GULIELMUS verificare vult quod præd. THOMAS TENNISON in narratione prædicta superius nominat. et præd. THOMAS TENNISON in literis dispensation. præd. superius nominat. sunt una et eadem persona et non alia neque diversa; quodque vicaria ecclesiæ Sancti Martini in Campis in brevi et narratione præd. superius nominat. necnon vicaria perpetua ecclesiæ parochialis Sancti Martini in Campis in literis dispensationis præd. superius mentionat. sunt una et eadem et non alia neque diversa.*

* [197]

Collation of the
defendant.

Averment of una
et eadem persona.

Demurrer to one
of the pleas.

Et præd. EDWARDUS WARD, armiger, modò attorn. difforum domini regis et dominæ reginæ nunc general. qui pro eisdem domino

regi

rege et domina regina sequitur quoad præd. placitum præd. EPISCOPI LONDON. pro dict. domino rege et domina regina dicit quod dict. dominus rex et domina regina per aliqua per præd. HENRICUM EPISCOPUM LONDON. superius placitando allegat. ab actione sua præd. inde versus ipsum EPISCOPUM LONDON. habend. præcludi non debent, quia dicit quod narratio prædict. materiæ. in eadem content. bona et sufficiens in lege existunt ad ipsos dominum regem et dominam reginam ad actionem suam præd. versus præfat. EPISCOPUM LONDON. habend. manutenend. ; quam quidem narrationem materiamq; in eadem content. eidem attorn. general. pro eisdem domino rege et domina regina parat. est verificare et probare prout cur. &c. Et quia præd. EPISC. LONDON. ad narration. illam non respondet nec illam hucusq. aliquoties deduc. idem attorn. general. pro eisdem domino rege et domina regina petit iudicium versus præd. EPISCOPUM LONDON. et breve metropolitanum, &c. eò quòd præd. EPISCOPUS LONDON. * est pars et nominat. in brevi originali ipsorum regis et reginæ sibi adjudicati, &c.

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Et quoad præd. placit. præd. GULIELMI LANCASTER per ipsum GULIELMUM superius in bar. placitat. idem attorn. general. pro eisdem domino rege et domina regina dicit quod dict. dominus rex et domina regina per aliqua per præd. WILLIELMUM LANCASTER superius placitando allegat. ab actione sua præd. inde versus ipsum WILLIELMUM habend. præcludi non debent, quia dicit quod placitum illud materiæque in eodem content. minus sufficiens. in lege existunt ad ipsos dominum regem et dominam reginam ab actione sua prædicta versus præfat. GULIELMUM LANCASTER habend. præcludend. quodque ipse pro ipsis domino rege et domina regina ad placitum illud modo et forma præd. superius placitat necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc idem attorn. general. pro eisdem domino rege et domina regina parat. est verificare ; unde pro defectu sufficiens. placiti præd. WILLIELMI LANCASTER in hac parte idem attorn. general. pro eisdem domino rege et domina regina petit iudicium versus ipsum WILLIELMUM et breve metropolitanum, &c.

Demur to the other.

Et præd. WILLIELMUS LANCASTER dicit quod placitum præd. per ipsum WILLIELMUM modo et forma præd. superius placitat, materiæque in eodem content. bon. et sufficiens. in lege existunt ad ipsos dominum regem et dominam reginam ab actione sua præd. versus prædictum WILLIELMUM habend. præcludend. ; quod quidem placitum materiamque in eodem content. ipse idem WILLIELMUS parat. est verificare et probare prout cur. &c. Et quia præd. attorn. general. pro eisdem domino rege et domina regina ad placitum ill. non respondet nec ill. hucusque aliquoties deducit, ipse idem WILLIELMUS (ut prius) petit iudicium, et quod prædict. dominus rex et domina regina ab actione sua præd. inde versus ipsum WILLIELMUM habend. præcludantur, &c. Sed quia cur. dict. domini regis et domine reginæ nunc hic de iudicio suo de et super præmissis reddend. nondum adiatur, dies inde dat. est tam præfat. attorn. general. domini regis et domine reginæ qui, &c. quam præd. EPISCOPO LONDON. et præd. WILLIELMO, coram domino rege et domina regina usque in crastino Sanctæ Trinitatis ubicunque, &c. de iudicio suo de et super præmissis illis inde

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audiend. eò quòd cur. diēt. domini regis et domine reginæ nunc hic inde nondum, &c. Ad quem quidem crastin. Sanctæ Trinitatis coram domino * rege et domina regina apud Westm. ven. tam præd. EDWARDUS WARD attorn. diēt. domini regis et domine reginæ nunc general. qui, &c. in propria persona sua quam præd. HENRICUS EPISCOP. LONDON. et WILLIELMUS LANCASTER per attorn. suum præd. Et sic continuat usque ad octab. Sancti Hill. Ad quas quidem octab. Sancti Hill. coram domino rege et domina regina apud Westm. ven. tam præd. EDWARDUS WARD attorn. diēt. domini regis et domine reginæ nunc general. qui, &c. quam præd. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER per attorn. suum præd. et super hoc visis et per cur. diēt. domini regis et domine reginæ nunc hic plenius intellectis omnibus et singulis præmissis maturæque deliberatione superinde habita videtur cur. domini regis et domine reginæ nunc hic quod narratio præd. materiæque in eadem content. bñ. et sufficien. in lege existunt ad ipsos dominum regem et dominam reginam ad actionem suam prædictam versus præfat. HENRICUM EPISCOPUM LONDON. habend. manutenend. quodque prædict. placitum præd. GUILLIELMI LANCASTER superius in barram placitat. materiæque in eodem content. minus sufficien. in lege exist. ad ipsos dominum regem et dominam reginam ab actione sua præd. versus præd. WILLIELMUM LANCASTER habend. præcludend. prout præd. EDWARDUS WARD qui, &c. superius allegavit. IDEO CONSIDERATUM EST, quod iidem dominus rex et domina regina nunc recuperent. versus præfat. HENRICUM EPISCOPUM LONDON. et WILLIELMUM LANCASTER præsentation. suam ad vicariam præd. et quod habeant breve JOHANNI CANTUAR. episcopo totius Angliæ primat. et metropolit. eò quòd præd. HEN. EPISCOPUS LONDON. est pars et nominatur in breve præd. quod non obstat. reclamatione ipsius episcopi et præd. GUILLIELMI LANCASTER licet vicaria præd. eidem WILLIELMO LANCASTER coll. it. est et ipse in corporali possessione ejusdem vicariæ possit. existit ipsum WILLIELMUM ab eadem vicariâ amoveat et ad vicariam præd. ad præsentation. diēt. domini regis et domine reginæ nunc idoneam personam admittat, et præd. HENRICUS EPISCOPUS LONDON. et WILLIELMUS LANCASTER in misericordia, &c.

* The Attorney General against Henry Lord Bishop of London, and Dr. Lancaster, and Dr. Birch.

In quare impedit, the king by THE WRIT entitled himself to the donation of a vicarage "in full right," but by the declaration entitled himself to it "by reason of his prerogative royal," AND HELD NO VARIANCE.—S. C. 2. Salk. 559. S. C. Show. P. C. 164. S. C. Carth. 313. 5. Co. 100. Cro. Eliz. 185. 3. Willf. 141. 3. Com. Dig. "Pleader" (C. 15.). 1. Com. Dig. "Abatement" (C. 8.). (H. 7.).

QUARE IMPEDIT for the vicarage of St Martin in the Fields, in the county of Middlesex; setting forth, that Humfrey late Bishop of London was seised of the ADVOWSON thereof in fee in the right of his bishoprick; which vicarage being void, he collated Dr. Lamplugh thereunto; who being afterwards made Bishop of Exeter, and THE VICARAGE being void by his promotion, King Charles the Second, by virtue of his prerogative, did present Dr. Lloyd thereunto, who was afterwards made Bishop of St. Asaph; and the said vicarage being again void by his promotion,

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the said king thereupon presented *Dr. Tennison*, who was afterwards made *Bishop of Lincoln*; so that the said vicarage being now void by his promotion, it belonged to the king and queen to present *ratione prerogativæ suæ regię*, but they were hindered by the defendants.

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The defendants craved *oyer* of the writ, which was read *in hæc verba*; by which it was recited, that the church was void, *et ad nostram spectat donationem*; and then they plead *in abatement*, and shew this *variance* between the *declaration* and the *writ*, *viz.* that by the *declaration* the king's title was set forth to present *ratione prerogativæ*, and by the writ it is *pleno jure*; so for this *variance* they pray that the writ may be quashed.

To this plea THE ATTORNEY GENERAL demurred, and the defendants joined in demurrer.

And thereupon there was a *respondeas ouster* awarded.

Upon which *the bishop* demurred generally to the declaration and THE ATTORNEY GENERAL joined in demurrer.

Dr. Lancaster pleaded in bar, and confessed the seisin of the late *Bishop of London*, as laid in the declaration, and all the presentations and consecrations, &c.; then he pleaded those clauses in the statute of 25. *Hen. 8. c. 21.* by which power is given to the *Archbishop of Canterbury* to grant dispensations as *the Pope* did formerly; that after the said statute, and before the writ purchased, the defendant was consecrated *Bishop of London*; and that *Dr. Tennison* was elected *Bishop of Lincoln* on the 25th day of *December* 1691; but before his consecration *the archbishop* granted a dispensation to hold the vicarage of *St. Martin*, and * the rectory of *St. James* in *commendam* with the bishoprick of *Lincoln*, until the first of *July* next after the date of the said dispensation; that the king, by letters patents under the great seal, did confirm the said dispensation, pursuant to the said statute of 25. *Hen. 8. c. 21.*; that *Dr. Tennison* was consecrated *Bishop of Lincoln*, and held the said vicarage and rectory in *commendam* till the said first day of *July*, and then the said church of *St. Martin* became void by his promotion, and the *Bishop of London* presented the defendant *Dr. Lancaster*, &c.

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Dr. Birch pleaded the same plea, *mutatis mutandis* as to the rectory of *St. James*.

To both which pleas THE ATTORNEY GENERAL demurred, and the defendants joined in demurrer.

FIRST, It was said, that there could not be a more material variance than between this writ and declaration; the one was general, and the other special, and founded upon different rights; and therefore, according to all the authorities in the books, the writ ought to be abated.

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Then the questions on the pleadings were :

FIRST, Whether the king had a prerogative to present upon an avoidance by cession ?

SECONDLY, If he has such prerogative, then, Whether this dispensation in *commendam retinere* has not satisfied his turn ?

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As to THE FIRST POINT, the common usage for above a hundred years, supported by solemn judgments, has settled that part of the prerogative, viz. that where an avoidance happens by *cession*, the king may present *ratione prerogativæ suæ* : this my LORD VAUGHAN, in arguing *Dr. Eade's Case* (a), took for granted. It is true, there may be some old books which deny this prerogative, but my LORD ROLLE was of opinion (b), that the law is otherwise at this day ; and to prove it, he cited *Holland's Case* (c), where the law was not only taken to be so now, but those old books were denied to be law, because the opinion in that case was, that the king had such a prerogative at the common law. But to make this a little more plain, there are two solemn judgments upon this very point ; the one is reported in *Moor* (d), which was thus, viz. The incumbent of the vicarage of *Barnham* was made *Bishop of St. Asaph*, and the queen presented one *Randal*, who was instituted and inducted ; and the patron brought a *quare impedit* ; there * was a plea in bar, and a demurrer to that plea ; and the question was, Whether the queen could present by virtue of her prerogative ? and upon perusal of many precedents and a great deliberation had, at last judgment was given for the queen. About thirty years afterwards the same question came to be debated again (e ; it was in a *quare impedit* brought for the church of *Tedin* in *Devonshire*, the incumbent being made a *Bishop in Ireland*, and the like judgment given as before against the grantee of the next avoidance. There is a single opinion of one Judge in the sixth year of the queen (f), that the crown had not such a prerogative ; but the opinion of one man cannot in reason or justice be opposed to solemn and deliberate judgments ; be-
 fore his consecration the *Archbishop of Canterbury* granted him a *dispensation* to hold the vicarage of *St. Martin* and the rectory of *St. James* in *commendam* with the *Bishoprick of Lincoln*, until the first day of *July* next after the date of the *dispensation*, which was confirmed by letters patents under the great seal, according to the statute of 25. Hen. 8. c. 21. AND IT WAS AGREED, 1st, That THE KING has, by his prerogative, a right to present to the church of a subject on the incumbent's being created a bishop. 2dly, That this prerogative shall take place upon all avoidances by *cession*. And 3dly, That the dispensation granted to *Dr. Tennison* had not satisfied the next turn, and therefore that THE KING, on *Dr. Tennison* being consecrated *Bishop of Lincoln*, was again intitled to present to the vicarage of *St. Martin*, thus rendered void by his promotion.—S. C. 3. Lev. 377. 382. S. C. Lev. Ent. 344. S. C. 1. June, 404. S. C. Comb. 205 300. S. C. Carth. 313. S. C. 1. Show. 413. 441. 493. S. C. 2. Salk. 540. 559. S. C. Show. P. C. 164. S. C. Ld. Ray. 23. 3. Com. Dig. 605.

(a) Vaugh 18. to 28.

(b) 2. Roll. Abr. 343. pl. 2.

(c) Cro. Eliz. 542.

(d) Wright's Case, Moor, 399.

(e) Woodley's Case, Cro. Jac. 691.

(f) Lycr, 228. b.

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sides, it is probable that some of the old books might induce that Judge to be of that opinion, not because they say the king had no such prerogative, but because when such actions were brought to recover presentations, as in the reign of *Edward the Third* and *Henry the Fourth*, *pro hac vice tantum*, there is no mention of this prerogative, and from thence it might be inferred he had none. But my *Lord Brooke* in his Abridgment (a) mentions a presentment to the church by *King Edward the Third* *ratione prerogativæ*, which the *Bishop of Ely* had seen, and it was where the church was void by *cession*, as in this case. It must be admitted, that until the reign of *Henry the Eighth* the books are not very clear in this point; but the reason is plain; it is because before that time the avoidance of a benefice by promotion could not properly be said to be the act of the king, but of THE POPE.

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SECONDLY, This title is not hurt by the dispensation *in commendam retinere*, or by any other matter appearing upon the record; for the dispensation coming after the election, and before the consecration, suspends and prevents the avoidance, and by virtue thereof the incumbent is still in his living *per vim prioris tituli*; and this appears plainly in *Sir Henry Sidney's Case* reported by my LORD DYER (b); for *Parkhurst*, who was the last incumbent of the living, had a dispensation to hold it for three years before he was made *Bishop of Norwich*; afterwards he was made a bishop, and resigned his living within the three years: upon this the queen presented, supposing she had a title by cession; and it was adjudged for the patron, that the living was void by resignation, which proves that the *Bishop of Norwich*, notwithstanding his consecration, was still incumbent of the living. * And as a farther evidence of this matter, if after such dispensation *in commendam retinere*, the patron should present another to the same living, the bishop may have a writ of *spoliation*, which will not properly lie but by one incumbent against another (c). The king's confirmation in this case does not give any new or other right to the incumbent than what he had before; it is only a formal thing to complete the act of the archbishop, which otherwise would be void. This is a temporary provision for the church, and but a few days more than a *commendam semestris*; which my LORD HOBART tells us (d) did grow out of a natural equity, that the church should not be without a pastor during that time wherein the patron is allowed by the law to present, and it being so small a portion of time, ought not to be regarded; for *de minimis non curat lex*.

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E contra. Most of the prerogatives of the crown were conferred upon our kings by the common law, such only excepted which are given by particular acts of parliament; but neither by the common or statute law has he any prerogative to present upon

(a) Bro. Abr. "Presentment al Eglise," pl. 61.

(b) Dyer, 228.

(c) Vaugh. 24.

(d) The case of Colt and Glover v. The Bishop of Coventry, Hob. 140. to 168.

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an avoidance by *cession*, where the patronage is in another. And therefore in *Woodley's Case* (a) it was the opinion of JUSTICE HUTTON, that where the king himself is not patron of the living, he shall not present, though he make the incumbent a bishop. As to what has been cited out of my *Lord Brooke's Abridgment*, it is little to this purpose, it is only what *the Bishop of Ely* told THE CHIEF JUSTICE; there was no judicial determination of the matter; and he begins and ends the case with a *NOTA* of admiration, that there should be such a presentment seen *ratione prerogativa* in the reign of *Edward the Third*, upon an avoidance by *cession*! It is true, presentments have been made to several churches by former kings, where the incumbents have been made bishops, not by virtue of any prerogative, but because the person promoted was patron of the church, and his temporalities were then in the king's hands upon his promotion: so is the 41. *Edw. 3. 5. b.*: and this was my *Lord Coke's* opinion (b), viz. where the king had seized the temporalities of the *Bishop of Exeter* for a contempt, and then made the *Archdeacon of Cornwall* a bishop, the king presented to the archdeaconry, because the temporalities of the bishop, who was patron thereof, were then in the king's hands. * The Year Book 11. *Hen. 4. fol. 37, 38.* is much against this prerogative, and it is the most antient case of a *commendam* that is reported in our books; it was a *quare impedit* brought by the king for a *Prebend of Salisbury* against *Robert Halommer*, Bishop of that see, and against *Henry Chichely*, Bishop of *St. David*: the declaration was, that *R. Medford*, late Bishop of *Sarum*, had collated the said *Henry Chichely* to the aforesaid prebend, who died; and that the *Bishop of London* was translated to *Sarum*, and from thence to *Bath and Wells*, by reason whereof the temporalities of the bishoprick of *Sarum* came into the king's hands; that *Chichely* was made Bishop of *St. David*, so that the said prebend became void by his promotion, and that it belonged to the king to present, who was hindered, &c. The *Bishop of Sarum* pleaded, that he was patron of the said prebend in right of his bishoprick, and traversed the avoidance when the temporalities of his predecessor were in the king's hands; and the incumbent pleaded, that he was presented by the *Bishop of Sarum*, and traversed the avoidance, *ut supra*: but the Court being of opinion, that he, being made a bishop, ought to shew some title to this prebend, he then pleaded, that before he was consecrated Bishop of *St. David*, he had a grant from the Pope to retain his former benefices, &c. It is true, no judgment was given upon this pleading, but the reason was, because NORTON, the King's Serjeant, relinquished the king's title as set forth in this count, and declared *de novo* upon the statute of Provisors, that THE POPE had usurped an authority to dispense against the law, &c. which shews that if the prebend was vacant, notwithstanding such dispensation when the temporalities were in the king's hands, then he might present; but if it became void after they were granted to

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(a) *Woodley v. Mainwaring*, Crm. Benloe, 142. S. C. Winch Ent. 876. Jac. 691. S. C. Winch. 54. C. W. (b) 4. Inst. 356.

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the succeeding bishop, then he could not present; so that it is plain the king's counsel did then think he had no such prerogative, and that he had either a right or none to present in that case, as the temporalities happened either to be or not to be in his hands. My Lord Brooke in abridging the aforesaid case (a) agrees, that when an incumbent is made a bishop, his former benefices are void, but doubts whether the king or patron shall present; and therefore he added a *quære* to the usage, because it seemed unreasonable to him that the king should present upon any promotion of the incumbent, where the right of a patronage is in another. * This was a prerogative not thought on when *St. Germaine* wrote (b); for he tells us, that when any benefice is void by *cession*, the six months to prevent a lapse shall be accounted from such *cession*; which shews that it was his opinion that the patron, and not the king, had the right of presentation, because if it belonged to the king, there could be no lapse. The judgment of the Court in *Sir Henry Sidney's Case* (c) was against this prerogative, and all the precedents before the reign of *Henry the Eighth* which mention it are nothing to the purpose, because they were between spiritual persons, who in those days were wholly subservient to the Pope; and it is a weak argument to alledge, that because the Pope presented at that time, therefore the king shall now; for what the Pope did was by an absolute usurpation; he had then such an authority in this nation, that JUDGE HANKFORD affirmed in the argument of that case between the king and the *Bishop of Salisbury*; "*quod Papa potest omnia*;" and my Lord Hobart calls him "*Dæmon meridianus* (d)." There was never any exercise of this prerogative in the reigns of those kings who withstood the usurpations of the Pope; sometimes it has been claimed, but still adjudged for the patron: so is 5. *Edw. 2. pl. 8.* where this prerogative is not so much as mentioned; neither does *Staundford* take any notice of it; and certainly if the king had had such a prerogative, it would not have escaped his observation under the title of his eighth chapter *de ecclesiis vacantibus, quarum advocaciones spectant ad regem, et alii presentaverunt ad eandem*. In *Wright's Case* (e), WILLIAMS, who then argued for this prerogative, gave this reason why the king should present upon an avoidance by *cession*, viz. because the Pope did so formerly before his power was abrogated by the statutes of *Henry the Eighth*, and therefore the king might do it, since that the bishop had his presentment *gratis*, both from the Pope then, and from the king now, and the patron had no power after a presentment made, till the death or resignation of his clerk. The Court, not being satisfied with this reason, asked him if he could shew any precedents to

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(a) Bro. Abr. "Presentment al
" *E. life*," pl. 14.
(b) Dr. and Student, 116.
(c) Dyer, 228.

(d) Hobart, 146.
(e) Owen, 144. Moor, 399. Cro.
Eliz. 526.

maintain

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maintain his argument ; but he could produce only a few between spiritual persons, and therefore the precedents were not regarded, because the persons whom they concerned were in absolute subjection to the Pope : and true it is, as JUSTICE WALMSLEY there observed, that this custom began by the usurpation of the Pope ; and he mentions the YEAR BOOK of *Edward the Second*, where upon solemn debate this point was adjudged for the patron.

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* SECOND POINT. But admitting the king has such a prerogative, then his dispensation in *commendam retinere* has satisfied his turn, especially since it has exceeded the canon ; for this was more than *semestris commenda*. These *commendatus* were never of any reputation either in the common or canon law ; it is *quasi comedendum* (a) ; and in this case it is not *semestris*, for it was for six months and nine days ; neither is it *perpetua*, but *temporanea* : now if this shall not be counted an exercise of the prerogative, and the turn to present thereby satisfied, then the king may dispense for twenty years, and afterwards present for life. There are variety of opinions how this *commenda limitata* shall be taken : some have held, that though it is limited for a certain time, yet the *commendator* may retain the living during his life ; others, that he shall have it only for the time limited ; and so long he must have it, for otherwise the church would be void during that time ; but all agree, that a grant in *commendam retinere* is *quasi* a presentation, and the church is thereby full of an incumbent. It is true, my LORD VAUGHAN was of another opinion in his argument in *Dr. Eade's Case* (b), that by virtue of such a dispensation before the parson is consecrated bishop he remains parson of the same benefice still, and has the same estate he had therein as well after as before his consecration, and that dispensation gave him no new right, but only a power to hold that which he had before, and by consequence there was nothing upon which the prerogative could work so as to satisfy the king's turn to the presentation ; but he was of opinion likewise, that such dispensation prevented an avoidance ; and if so, that will defeat the grantee of the next avoidance to present ; for he is to have the next presentation only, and that he cannot have where a dispensation interposes ; so that it seems such a dispensation shall amount to a presentation upon the next avoidance (be it by *cession* or otherwise) so as to be good against such grantee, and to make his grant void ; and what reason can be given why it shall not likewise be a presentation by the king upon an avoidance by promotion ; and if so, then his turn must be satisfied.

2. Saik. 540.

In *Hilary Term* afterwards JUDGMENT was given for the king

(a) Hobart, 144.

(b) Vaugh. 18. to 28.

Upon

Upon the same reasons judgment was also given in *Dr. Birch's Case*, which is as follows :

The parish of *St. James* was newly constituted by the statute 1. Jac. 2. c. 22. out of the parish of *St. Martin*.

The substance of which act was, * That a certain precinct of ground therein-mentioned shall be the parish of *St. James, &c.* ; that there shall be a rector thereof, &c. ; that *Dr. Tennison* shall be the first incumbent ; that he and his successors, rectors thereof, shall be a corporation, &c. ; that the patronage thereof, after his decease or avoidance, shall be in the *Bishop of London* and his successors, and in *my Lord Jermyn* and his heirs, by turns ; that after the decease or avoidance of *Dr. Tennison* the *Bishop* shall present, then *my Lord*, and afterwards *the Bishop, &c.* shall have two turns, and *my Lord* and his heirs one turn.

This act was set forth in the declaration, and that *Dr. Tennison* was made *Bishop of Lincoln* ; that the said church of *St. James* became void upon his promotion, and thereupon it belonged to the king and queen by virtue of their prerogative to present, &c.

Dr. Birch pleaded the same plea as *Dr. Lancaster* did in the case before-mentioned.

The debate now was, that admitting the king had a prerogative to present by *cession*, yet such a prerogative could not be exercised in this case, because it would be expressly against such an act of parliament ; for this was a parish newly created, the church was never yet presentative, and being now void by *cession* the presentation must be in the bishop ; for by the words of the act it is expressly given to him after the decease or avoidance of *Dr. Tennison*.

The king is entitled to several prerogatives by the common law, as a subject is to a prescription or custom ; but both prerogatives, prescriptions, and customs, may be bound by acts of parliament (a). Concerning the first of which there are these and many more instances, viz. By the statute of *Marlbridge, cap. 22.* it is enacted, " That none may distrain his freeholders to answer for their freehold without the king's writ." This is a general law ; and though the king is not named by way of restraint, yet it has been " shall first present to the said rectory, and then *Lord Jermyn* and his heirs shall present to the said new parish, and so by turns for ever." *Dr. Tennison* was created *Bishop of Lincoln*, by which promotion the church of *St. James* became void. AND IT WAS AGREED, that THE KING by virtue of his prerogative, and not THE BISHOP OF LONDON by virtue of the statute, shall present to the vacant rectory ; for although the Legislature creates it a new parish, yet the church is, in this respect, subject to the like incidents as all other churches are by the common law — S. C. 1. Show. 413. 441. 493. 501. S. C. 3. Lev. 377. S. C. Lev. Ent. 344. S. C. 1. Jones, 404. S. C. Comb. 205. 300. S. C. Carth. 313. S. C. 2. Salk. 540. 559. S. C. Holt, 585. 3. Com. Dig. 198. 4. Bac. Abr. 200.

The statute 1. Jac. 2. c. 22. enacts, " that the precinct called *St. James* in the Fields shall be for ever a distinct parish of itself, by the name of *St. James* in *Westminster*, and exempted from the parish of *St. Martin* in all respects whatsoever relating to the same ; that *Dr. Tennison*, the then vicar of *St. Martin*, shall be rector of the parish of *St. James* ; that the patronage of the said rectory, after the death of *Dr. Tennison* the first rector, or on the next avoidance thereof, shall be vested in the *Bishop of London* and *Lord Jermyn* ; that the *Bishops of London*, after the said death or avoidance,

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THE ATTORNEY GENERAL rectory by *cession*, as well as upon the like avoidance of any other presentative living whatsoever.

against
HENRY LORD Afterwards, in *Michaelmas Term*, in the sixth year of *William the Third*, the judgment was,

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FIRST, That the king has a prerogative to present by *cession*.

SECONDLY, That this dispensation in *commendam retinere* had not satisfied the *next turn*, and so not barred the king of the prerogative, &c.

FIRST, The king has a prerogative to present upon the promotion of an incumbent; and this is no innovation; for there being no judicial opinion to the contrary, is a sufficient evidence to prove this right; and though a natural reason cannot be given to support it, yet it seems very just, that when the king, by the exercise of his prerogative, has made a church void, that he should have a right to fill the vacancy; for it is but the exchanging of a life, and it is probable the patron may (notwithstanding the change) be as near to his presentation as before the avoidance by *cession*. There are but few authorities in the books to direct one's judgment before the reign of *Queen Elizabeth*, because *the Pope* then claimed such presentations as belonging to his ecclesiastical jurisdiction, and the kings of *England* very seldom disputed his claim; but it does not follow that they had no such prerogative, because not claimed in many years; and though a perfect reason cannot be given why such a prerogative should be allowed by * the common law, yet the king shall not be barred of his right; for no reason can be given for a collateral warranty, and yet that is law at this day. The bishoprics of *England* were at first *donative*, but from the seventeenth year of *King John* to the twenty-fifth year of *Henry the Eighth* (a) the bishops were to be chosen by the dean and chapter, but then such election must have the king's confirmation; and even the statute of 25. *Hen. 8. c. 20.* which expresses the manner of making bishops, does in some measure restore THE CROWN to its ancient prerogative; for though by licence under the great seal the prior and convent then, and the dean and chapter now, have leave to elect, yet there must be a *letter missive* containing the *congé d'essire*, and the name of the person whom they shall chuse. The authorities which have been cited to maintain his prerogative were *Wright's Case* (b), where the question was fully stated and adjudged, and it was afterwards admitted to be law in *Sir Robert Bassett's Case* (c). My LORD DYER, in *Hilary Term* in the sixth year of *Queen Elizabeth*, put the case of *Sir Henry Sidney* (d) upon a *quare impedit* against the *Bishop of Gloucester* and one *Reve*, who was one of the queen's chaplains, and whom she presented to a church, having made *Parkburst*, the former incumbent, *Bishop of Norwich*, supposing she had a

(a) See the statute 25. *Hen. 8. c. 20.*

(b) 1. *Leon. 156.*

(c) *Cro. Eliz. 790.*

(d) *Dyer, 228. pl. 48. S. C. Bendl. 140.*
prerogative

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prerogative to present upon an avoidance by *cession*, which he did not take to be law, and then said, *quod alii socii mei non sentiebant*; but the case was not adjudged upon that reason; it seems only to be a parenthesis, and a sudden opinion of the Judge. Many cases may be cited where the temporalities of bishops have been seized by the king, and then he has presented to the church upon the promotion of the incumbent; from whence it is inferred that such presentations were not by virtue of any prerogative, but because the temporalities were in the king's hands. This certainly must be a very weak inference; for to what purpose should the king make use of his prerogative when he had an interest in the advowson itself, of which the bishop was patron, &c. in respect his temporalities were then in the king's hands? So that the force of this argument must be, *viz.* because the king made use of his interest, therefore he had no prerogative, which is very absurd and inconsequential. The reason why all the books are silent in this matter is, because before the statute of Provisors (*a*) the king was defeated of this prerogative by the usurpation of *the Pope*: and this is not only an answer to what was done before the making of that statute, but since also; for, notwithstanding that law, the clergy were so closely united in interest, that they still usurped upon the rights of the succeeding kings, for *the Pope* still made bishops in England. Sixteen years after that statute this case happened: *John Bishop of Salisbury* (*b*), being patron in right of his bishopric, presented *W.* and died, so that his temporalities came to the king; *W.* who was the presentee of the bishop, was afterwards made *Bishop of Salisbury*; and because he could not be both patron and incumbent of the living, the king brought a *quare impedit*; the defendant pleaded, that after the death of *John Bishop of Salisbury*, his immediate predecessor, and before his consecration, and likewise before the living was void, the king by letters patents (reciting his being made a bishop by *the Pope*) had granted to him the temporalities, so that he ought not to present; and this was held a good plea at that time; which shews that *the Pope* usurped upon this prerogative. It is true, this prerogative to present by *cession* is not mentioned in the statute *de Prærogativa Regis* (*c*), no more is the prerogative to present by *lapse*; and yet this was never yet denied the king, though nothing was said of it likewise in any of the old books. It is mentioned in *Caudry's Case* (*d*) that the law was thus in the reign of *Edward the Third*, *viz.* If the metropolitan did not present within six months, *THE KING* and not *the Pope* should provide a pastor; and yet no such authority can be found in that king's time. But ever since that case was abridged by *Brooke* (*e*) this prerogative has been enjoyed by the kings of England; and there are no precedents that the patron has presented upon the promotion of his incumbent.

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(a) 25. Edw. 3. ft. 6. l. 4.

(d) 2. And. 122. S. C. Poph. 59.

(b) Year Book 41. Edw. 3. S. C. 5. Co. 1.

pl. 5.

(c) 17. Edw. 2. ft. 1. c. 1.

(e) Bro. Abr. "Presentment at Exchequer," pl. 61.

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SECOND POINT. This *commendam retinere* is not a serving the king's turn; for it is not putting a man into possession of a new living without institution or induction, it is only a continuation of the old benefice in the same person where it was, for that which he had before cannot be properly said to be commended to him; there is no new right transferred. It is true, if the incumbent had died during the continuance of such dispensation, the king might have lost his title to present (a).

* [213] AND LASTLY, As this case stands upon the act of parliament, the king's prerogative is let in by making of the church of St. James a rectory, and by settling the * patronage; and it is no objection to say that the prerogative shall not work, it being newly created and made a parish; for when once it is established, it is subject to all the ecclesiastical laws, as non-residency, deprivation, &c. It is to be void by the same methods which make other rectories so, viz. if the patron do not present within six months after the death of the incumbent it shall lapse to the ordinary (b); so that the patron is bound by the same laws in this case as in all other cases of ancient rectories, and the next avoidance itself may be granted over by the act of the party.

As to the objection, that the present rector does not come in by presentation, institution, or induction, but that it is a donative by the parliament at least during his time; and then, as was affirmed, that if the incumbent of a donative is made a bishop the king shall not present, because such a promotion doth not make an avoidance by cession, for the incumbent is the creature of the founder, and is not subject to ordinary and episcopal visitation; this must be admitted to be law: but yet if an incumbent of a donative be made rector by act of parliament, as *Dr. Tennison* was in this case, then the king has a prerogative to present upon the promotion of such rector. *The Prince's Case* (c) comes near this at the bar; for, in the eleventh year of *Edward the Third*, the Prince was created *Duke of Cornwall*, "HABENDUM ET TENENDUM eidem duci et filiis primogenitis ipsius et heredum suorum regum Angliæ, &c." By these words the Prince had an estate in fee-simple in the said dukedom newly created by act of parliament, the consequence of which was, that the Prince should be endowed thereof. So here, though this is a new rectory created by the like authority, viz. by act of parliament, yet it is subject to the same laws and rules with other rectories more ancient in time.

Then as to the objection, that it is not an advowson presentative during the life of *Dr. Tennison*, for by the express words of the act the presentation does not vest in the patrons till after the death or avoidance of the present incumbent; and if so, the king's prerogative cannot operate here, because he is intitled to present

(a) Vaugh. 18. Winch. 91. Jones, 61. Hobb. 142. 2. Roll. Abr. 344. (b) 6. Co. 62. (c) 2. Co. 31.

when the presentee of the patron is advanced to a greater dignity in the church, and here is no patron yet ; now admitting it to be so, this will not prejudice the king's title, because it is the promotion of the incumbent that entitles the king, let the advowson or patronage be where it will. * But notwithstanding this objection, the right of patronage, even in this case, is vested immediately. It is like a reversion for life granted *cum acciderit post mortem* of the tenant for life, which vests an interest immediately, though to commence in possession *in futuro* (a).

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LASTLY, It was never intended by the parliament to deprive the king of this prerogative ; and therefore this act must be construed (as the rule is in *Sir Francis Barrington's Case*) (b) according to the subject-matter.

For which reasons judgment was given for the plaintiff, *absente* GREGORY, *Justice*; which judgment was afterwards affirmed in parliament.

(a) Cro. Eliz. 323. 1. Saund. 147.

(b)

Gwynn against Pic.

Case 81.


EJECTMENT for two messuages, two gardens, and seventy *Prædices*. acres of land, fifteen acres of meadow, and thirty acres of pasture in *Much-Dew Church, &c.*

The plaintiff delivered declarations to two tenants only ; and, as to the lands in their possession, the defendant entered into the common rule.

But because he had made several small purchases in that parish, and the plaintiff claimed only twenty acres lately granted to him by lease from the *Bishop of Gloucester*, therefore he moved by his counsel, that the plaintiff might give a *note* in writing, before the first day of the next Term, what lands in particular he claimed, and where such lands did lie, and in whose possession, &c. or otherwise that he might not proceed to a trial at the next assizes; for the defendant not knowing what lands the plaintiff would claim, could not tell what purchase-deeds to produce at the trial.

Sed non allocatur.

1122



MICHAELMAS TERM,

The Fifth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

* Blankard against Galdy:

* [215]
Case 82.

Easter Term, 3. Will. & Mary, Roll 35.

MEMORANDUM quod alias scilicet Termino Sancti Mich. ultimo præterit. coram domino rege et domina regina apud Westm. venit JOHANNES BLANCARD ar. per JACOBUM CUNNINGHAM attorn. suum et protulit hic in curia dicti domini regis et dominæ reginæ tunc ibidem quandam billam suam versus LAURENTIUM GALDY alias dicti. LAURENS GALDI mar. demeurant. a Londres en la paroisse de St. Pierre le Pauvre in custod. mar. &c. de placito debet. et sunt pleg. de prof. scil. JOHANNES DOE et RICHARDUS ROE, quæ quidem billa sequitur in hæc verba, ff LONDON ff. JOHANNES BLANCARD ar. queritur de LAURENTIO GALDY alias dicti. LAURENS GALDI mar. demeurant. a Londres en la paroisse de St. Pierre le Pauvre in custodia mar. marefc. domini regis et dominæ reginæ coram ipso rege et regina existen. de placito, quod reddat ei mille libras sterling legalis monetæ Angliæ quas ei debet et injuste detinet pro eo, videlt. quod cum præd. LAURENTIUS quinto die Januarii anno regni DOMINI WILLIELMI et DOMINÆ MARIÆ nunc regis et reginæ Angliæ, &c. tertio apud LONDON. præd. videlt. in parochia BEATÆ MARIÆ de arcubus in warda de CHEAP per quoddam scriptum suum obligatorium sigillo ipsius LAURENTII sigillat. curiæq. * dicti domini regis et dominæ reginæ nunc hic ostend. cujus dat. est eisdem die et anno cogn. se teneri et fir-

Memorandum.

Debt upon a bond.

2. Salk. 411.

* [216]

Michaelmas Term, 5. William & Mary, In B. R.

BLANKARD
against
GALDY.

miter obligari præfat. JOHANNI BLANKARD in præd. mille libris solvend. eidem JOHANNI cum inde requisit. esset; præd. tamen LAURENTIUS licet sæpius requisit. &c. præd. nullo libras præfat. JOHANNI nondum solvit sed ill. ei bucusque solvere omnino contradixit et adhuc contradicit ad dampnum ipsius JOHANNIS viginti librarum, et inde producit sectam, &c.

Imparience.

Et modo ad hunc diem scil. diem Mercurii prox. post Quinden, Paschæ isto eodem termino, usque quem diem præfat. LAURENTIUS GALDY habuit licentiam ad billam prædict. interloquend. et tunc ad respondend. &c. coram domino rege et domina regina apud Westm. venit tam prædict. JOHN BLANKARD per attorn. suum prædict. quam prædict. LAURENTIUS GALDY per RICHARDUM THOMPSON attorn. suum, et idem LAURENTIUS defend. vim et injuriam quando &c. et petit auditum scripti obligatorii prædict. et ei legitur in hæc

Oyer of the
bond, which is
in French.

verba, ff. "SCACHENT tous par ces presentes que nous LAURENS GALDY marchand demeurant a LONDRES en la paroisse de St. PIERRE le Pavure et JAQUES GOWLALES aussi marchant du dit LONDRES demeurant en la paroisse de St. PIERRE CORNHILL sommes tenus et fermement obliges solidairement, viz. seul pour le tout a JEAN BLANCHARD provost mareschal del isle de la JAMAICA demeurant en paroisse de St. JAQUES WESTM. en counte de MIDDLESEX en le somme de mille livres sterlings monoie d'Anglie pour estre payes au dit JEAN BLANCHARD ses executeurs administrateurs ou ayant cause, pour faite lequel payment bien et veritablement nous obligions et chacun de nous solidairement seul et pur le tout nos heretiers executeurs ou administrateurs ou ayant cause, ou les heretiers executeurs et administrateurs de chacun de nous fermement par ces presentes seale de nos seaux dat le cinquieme jour de Janvier dans le troisieme an du raigne de nos souverains signieur et dame GUILLAM et MARIE roy et roynes d'Angle d'Ecosse France et Ireland defenseurs de la foy, &c. ANNOQ. DOM. 1662." Petit etiam auditum conditionis

Oyer of the
condition.

scripti obligatorii præd. et ei legitur in hæc verba, ff. "La CONDITION de cette obligation est que si LAURENS GALDY demeurant a LONDRES dessus oblige et LOUIS GALDY son frere habitant del isle de JAMAICA in AMERIQUE eu tous deux ou les heretiers executeurs ou administrateurs deux ou de le une tienent excitant accomplissent et fourt bien et veritablement tous et chacuns les clauses promesses conditions et plaints que de la parte de dit LAURENS GALDY et LOUIS GALDY ou de l'une deux ou de leurs heretiers executeurs et administrateurs se tener executer accomplier et payer compris et specifie dans certaine accord et traite dats de jour de la date des fait autres sus nomme JEAN BLANKARD dune partes et de le dit LAURENS GALDY tant par luy que pur le dit LOUIS GALDY d'autre parte selon veritable sens et intention d'un accord et traite, alors la present obligation serra nulle et de nul effect, autrement serra et demoura en sa plene force et vertue." Quibus lectis et auditis idem LAURENTIUS dicit quod præd. JOHANNES actionem suam præd. inde versus ipsum LAURENTIUM habere seu manutenere non debet, quia dicit quod articul. et agreement. in conditione præd.

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*præd. scripti obligatorii mentionat. fact. fuer. apud LONDON. præd. in paroch. et warda præd. quinto die Januarii anno regni DOMINI WILLIELMI et DOMINÆ MARIÆ nunc regis et reginæ Angliæ, &c. tertio supradictio inter præd. JOHAN. BLANCARD per nomen JOHANNIS BLANCARD præpositi marescal general Angliæ provost marshal general de insula de JAMAICA residen. in parochia SANCTI JACOBI Westm. in com. MIDDLESEX ex una parte, et præd. LAURENTIUM GALDY per nomen LAURENTII GALDY mercatoris residen. in LONDON. in parochia SANCTI PETRI PAUPERIS agens tam in nomine suo quam pro fratre suo LUDOVICO GALDY habitator. præd. insulæ de JAMAICA ex altera parte, quorum quidem articulorum alteram partem sigillo ipsius JOHANNIS BLANCARD sigillat. idem LAURENTIUS hic in curia profert (geren. dat. eisdem die et anno supradictis) recitan. modo sequen. videlt. in consideratione quod LAURENTIUS GALDY in nomine LAURENTII GALDY prædict. fecisset contract. articuli et agreement. cum præd. JOHAN. BLANCARD pro exercitio prædict. oneris vel officii præpositi marescal. de JAMAICA duran. termino septem annorum et dimidii unius anni incipend. a sexto die Julii tunc proximo anno domini 1692 sub clausula et conditione postea mentionat. et quod JOHANNES BLANCARD misisset novam commissionem procuration. vel deputation. isto die dat. cujus deliberasset quatuor copias Anglice dispatches per ipsum signat. et sigillat. in manus prædict. LAURENTII GALDY præfat. LUDOVICO GALDY direct. cum spatio Anglice a blank ad inferend. Anglice to fill up et ponend. nomen talis aliæ personæ habitatoris * præd. insulæ qualis præd. LUDOVICUS GALDY apt. estimaret ad dictum officium exercend. partes præd. agreeissent de articulis sequen. Et imprimis quod deputatio supramentionat. (isto die dat.) non fact. fuit sed pro exercitio dict. officii idem ad incipiend. a præd. sexto die Julii tunc prox. sequen. usq. ad tempus in quo præd. LAURENTIUS GALDY notum faceret præd. JOHANNI BLANCARD nomina personarum quas præd. LUDOVICUS GALDY convenien. estimaret nominare pro deputat. suis durante tempore quod inexistat. remaneret de præd. septem annis et dimid. unius anni; et quod tam cito quam præd. nominatio et declaratio nominum de putat. præd. fact. foret præd. JOHANNES BLANCARD obligat. foret facere et mittere Anglice to pass eis novam deputation. pro resid. dicti termini septem annorum et dimid. unius anni; et quod ista deputatio (eodem die dat.) vacua et nullius effectus remaneret. Et ulterius dic. quod præd. LAURENTIUS GALDY tam pro seipso quam pro præd. LUDOVICO GALDY parte sua firmiter alteruteri et pro toto convenerunt agreeverunt et obli. averunt seipsos executores et administratores suos (causam habentes) prædicto JOHANNI BLANCARD executoribus et administratoribus suis et causam habent.olvere vel solvi casari. bene et fideliter vere et de facto præd. JOHANNI BLANCARD executoribus administratoribus suis (cum causam haberent) summam quodringent. librarum sterling pro quolibet anno bonæ et legalis monetæ Angliæ duran. præd. termino septem annorum et dimid. unius anni in eadem civitate LONDON. in domo ubi præd. JOHAN ES BLANCARD habitavit vel habitaret ad finem terminorum solution. postea mentionat. in quatuor equal. solution. videlt. super sextum diem*

BLANCARD
against
GALDY.

The defendant
pleads, that the
bond was made
in London, for
the exercise of
an office in Ja-
maica.

* [218]

BLANCARD
against
GALDY.

* [219]

*Octobris super sextum diem Januarii super sextum diem Aprilis et super sextum diem Julii cujuscumque præd. annorum de quibus prima solutio facta foret super sextum diem Octobris tunc præx. ac etiam quod LAURENTIUS GALDY in nomine præd. firmiter obligavit se ipsum ut præferretur defendere Anglice to save harmless et indemnum præstare prædict. JOHANNEM BLANCARD ab omnibus periculis prædict. officii duran. præd. termino septem annorum et dimid. unius anni et a dampnis detrimentis et confiscationibus quæ accrescerent ab onere prædict. pro negligentia defalt. defect. mala gestura vel malâ administratione tam prædict. LUDOVICI GALDI quam deputatorum suorum vel personarum cum quarum nominibus specificat. in prædict. deputatione * inserti. foret vel quas postea appunctuaret pro deputat. suis. Et quod prædict. LUDOVICUS GALDY vel illi quor. nomina, &c. bonam et sufficiens securitatem darent gubernatori præd. insulæ pro exercitio præd. officii in modo sicut consuet. est et in casu placeret dictis domino regi et dominæ reginæ revocare literas patentes quas concesserunt de dicto officio præfat. JOHANNI BLANCARD quinto die Novembris, anno Domini 1690, secundum potestatem quam reserverunt sibi ipsi per præd. literas, vel si præd. dominus rex et domina regina offic. cessare causarent ante expirationem præd. septem annorum et dimid. unius anni conclusum et agreeatum fuit inter partes prædict. quod tunc istud agreeamentum una cum prædict. deputatione fact. prædict. LUDOVICO GALDY vel ejus deputat. et quæ postea per prædict. JOHANNEM BLANCARD fact. foret null. et nullius effectus remaneret quasi eadem nunquam fact. fuisset; in quo casu præd. LAURENTIUS et LUDOVICUS GALDY non solverent præd. JOHANNI BLANCARD executoribus vel administratoribus suis (et causam habent.) pro aliquo longiore tempore quam quo gauderent et exercerent dictum officium per ipsos vel eorum deputat. et solummodo usque ad diem in quo actualiter amoti forent ab exercitio præd. officii secundum ratam quidringent. librarum sterlingorum per annum, &c. prout per articulos præd. plenius liquet et apparet. Et idem LAURENTIUS ulterius dicit quod per quendam actum in parlamento DOMINI EDWARDI SEXTI nuper regis Angliæ, &c. tent. apud Westm. in com. Middlesex per prorogationem vicesimo tertio die Januarii anno regni dicti domini nuper REGIS EDWARDI SEXTI quinto et ibidem continuat. usque decimum quintum diem Aprilis, anno regni dicti nuper REGIS EDWARDI SEXTI sexto inter alia inactitat. fuit autoritate ejusdem parlamenti quod si aliqua persona vel personæ ad aliquod tempus (anid so recite the act usque ad the first proviso) prout per eundem actum inter alia plenius liquet et apparet. Et idem LAURENTIUS ulterius dicit quod post præd. actum parlamenti scilicet. præd. quinto die Januarii anno regni domini regis et dominæ reginæ tertio suprâdicto apud London. prædict. in parochia et warda prædict. agreeat. fuit inter prædict. JOHANNEM BLANCARD et prædict. LAURENTIUM et LUDOVICUM quod prædict. JOHANNES faceret præfato LUDOVICO deputation. officii prædict. præpositi mar. Anglice of provost marshal in articulis prædict. mentionat. pro prædict. termino septem annorum et dimid. unius*

Theat of Edw.
VI. against sell-
ing offices,
pleaded.

* [220]

* anni et sub conditione et agreeament. præd. in prædictis articulis mentionat.

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mentionat. et quod præd. LUDOVICUS et LAURENTIUS pro deputat[i]o[n]e officii præd. sic faciend. solverent præfat. JOHANNI annual. summam quadringent. librarum sterlingorum sub modo et agreement. in articulis præd. mentionat. quodque adtunc et ibidem in prosecution. agreement. præd. et pro securitat. solutionis dict. annualis summe quadringent. librarum articuli præd. et scriptum obligatorium præd. hic in cur. prolat. fact. fuer. Et idem LAURENTIUS ulterius dicit quod præd. officium præpositi mar. Anglice of provost marshal in articulis præd. mentionat. tangit et concernit et præd. tempore consecution. articulorum agreement. et scripti obligatorii præd. tangebatur et concernebat administration. et execution. justitiæ infra prædict. insulam de JAMAICA existen. parcel. possessionum et retentionum dictorum domini regis et dominae reginae coronæ suæ Angliæ et sub eorum regimine; quodque annual. reddit. vel summa quadringent. librarum per annum per prædict. articulos agreeat. solvend. per prædict. LAURENT. et LUDOVICUM GALDY eidem JOHAN. solut fuit pro exercitio et deputat[i]o[n]e officii præd. contra formam statuti præd. videlt. apud LONDON. præd. in paroch. et warda præd. Et sic idem LAURENTIUS dicit quod scriptum obligatorium præd. necnon articul. præd. hic in cur. prolat. vigore statuti præd. penitus vacua et nullius vigoris in lege existunt. Et hoc parat. est verificare; unde petit judicium si præd. JOHANNES action. suam præd. inde versus eum habere seu manutenere debeat, &c.

BLANKARD
against
GALDY.

The office concerning the execution of justice.

Et præd. JOHANNES dicit quod ipse per aliqua per præd. LAURENT. superius placitando allegat. ab actione sua præd. inde versus ipsum LAURENTIUM habend. præcludi non debet, quia protestando quod præd. officium præpositi mar. non tangit seu concernit executionem justitiæ, idem JOHANNES pro placito dicit quod insula præd. in partibus transmarinis existit necnon ex antiquo habitat. et possessionat. fuit per Hispanos Indos et alios homines alienigenos et forinsecos inimicos hujus rei n[ost]ræ ANGLIÆ extra licentiam sive gubernation. hujusce regni; quodque anno millesimo sexcentesimo quinquagesimo quinto insula præd. et inhabitant. ejusdem insulæ per vim subditorum hujus regni ANGLIÆ virtute debita et sufficien. autoritate in ea parte habita commissiõ. conquest. et in subjection. reduct. fuerunt; quodque abinde continuè postea hucusque insula præd. necnon inhabitantes et incolæ inde per jura leges et statuta ejusdem insulæ propria et non per actus parliament. sive statut. hujus regni ANGLIÆ regulat. et gubernat fuit et adhuc est; quodque * executio officii præd. eandem insulam et incolas inde tantummodo concernit et in ead. insula solummodo executor. et non aubi. Et hoc idem JOHANNES parat. est verificare; unde petit judicium et debitum suum præd. una cum dampnis suis occasione detentionis dicti illius sibi adjudicari, &c.

Replication.

That the island was conquered,

and are governed by their own laws, and not by the statutes of England.

* [221]

BARTHOL. SHOWER.

Et prædict. LAURENTIUS dicit quod bene et verum est quod ante conquestum insulæ præd. in replicatione præd. JOHANNIS superius mentionat. insula præd. gubernat. fuit per leges et statuta et jura ejusdem insulæ propria sed insula præd. a tempore conquestus præd. semper fuit parcel. hujus regni ANGLIÆ et per leges et statuta hujus regni

Rejoinder, that before the conquest they were governed by their own laws, but not since.

BLANKARD
against
GALDY.

regni ANGLIÆ et non per præd. leges jura et statuta insulæ præd. propria gubernat. Et hoc parat. est verificare; unde ut prius petit judicium, et quod præd. JOHANNES BLANCARD ab actione sua præd. inde versus ipsum habend. præcludatur, &c.

FR. PEMBERTON.

To this rejoinder there was a demurrer, and the defendant joined in demurrer.

Continuancy.

Sed quia cur. domini regis et dominæ reginæ nunc hic de judic. suo de et super præmissis reddend. nondum admissatur, dies inde dat. est partibus præd. coram domino rege et domina regina apud Westm. usque diem Veneris prox. post crast. Sancti Trin. de judicio suo de et super præmissis ill. audiend. eo quod cur. dict. domini regis et dominæ reginæ nunc hic inde nondum, &c. (continuand. usque in oct. Martini). Ad quem diem coram domino rege et domina regina apud Westm. ven. partes præd. per attorn. suos præd. super quo vis. et per cur. dict. domini regis et dominæ reginæ nunc hic plenius intellectis amnibus et singulis præmissis maturaque deliberatione inde habita, videtur cur. dict. domini regis et dominæ reginæ nunc hic quod placit. præd. per præd. LAURENTIUM modo et forma præd. superius rejungero placitat. materiaque in eodem content. minus suffic. in lege exist. ad ipsum JOHAN. ab actione sua præd. inde versus præfat. LAUR. habend. præcludend. IDEO CONSIDERATUM EST quod præd. JOHAN. recuperet versus præfat. (def.) debit. suum præd. necnon 11l. pro dampnis suis quæ sustin. tam occasione detent. debiti illius quam pro missis et custag. suis per ipsum circa sect. suam in hac parte apposuit. præd. JOHAN. Per cur. dictor. domini regis et dominæ reginæ nunc hic ex assensu suo adjudicat, et præd. LAURENTIUS in misericordia, &c.

• [222]

Case 83.

• Blankard against Galdy.

The municipal laws of ENGLAND do not extend to the island of JAMAICA; and therefore to debt on a bond, made to the PROVOST-MARSHAL of Jamaica, for the payment of 400l. a year, in consideration of his having granted a deputation of the said office to the defendant for seven years and a half, he defendant cannot plead the English statutes of 5. & 6. Edw. 6. c. 16. made against buying and selling offices.—S. C. 2. Salk. 411. S. C. Comb. 228. S. C. Holt, 341. Co. Lit. 234. Noy, 102. Moor, 781. Cro. Jac. 269. 65. 2. Lev. 283. 2. Vent. 187. 1. Leon. 295. 1. Com. Rep. 2. 1. Salk. 468. 2. Mod. 45. 6. Mod. 234. 1. Hawk. P. C. ch. 67. f. 4. 4. Burr. 2459. 2. Ld. Ray. 1245. 5. Com. Dig. "Navigation" (G. 1). 3. Bac. Abr. 731.

THE PLAINTIFF was provost marshal of Jamaica, and by certain articles made between him and the defendant, he granted a deputation of that office to the defendant for seven years and a-half, under the yearly rent of four hundred pounds; and the defendant gave bond for the performance of the agreement.

An action of debt was brought upon that bond. The defendant pleaded the statute of 5. & 6. Edw. 6. c. 16. made against buying and selling of offices, and averred that this office concerned the administration of justice in Jamaica, and that by virtue of that statute both the bond and articles were void. The plaintiff replied, that Jamaica was an island inhabited formerly by the SPANIARD, and governed by their own laws ever since the conquest

thereof

Michaelmas Term, 5. William & Mary, In B. R.

thereof by THE ENGLISH, and that the execution of the said office only concerned the said island, and the inhabitants thereof, &c. The defendant rejoined, and confesses it to be a *conquered nation*, but that ever since the conquest thereof it was parcel of this kingdom, and governed by the laws of *England*, and not by their own laws, &c. The plaintiff demurred to the rejoinder. The defendant joined in demurrer.

BLANKARD
against
GALBRAITH

This case was argued in *Trinity Term* by THE COUNSEL who drew the pleadings.

The only question was, Whether the laws of *England* were in force in *Jamaica*?

It was said, that acts of parliament made in *England* do not bind the people of *Jamaica*, because they have no representatives in our parliaments. Many instances were given to maintain this opinion; as, the statute of 5. *Eliz.* c. 4. has no force there; for by that law it is enacted, "that no servant shall be retained without a testimonial; that the justices shall assess the wages of servants; and that no person shall exercise a trade without being apprentice for seven years:" now if this should be law in *Jamaica*, it would destroy all the planters. The statute of Usury does not bind them, for they allow there more for the loan of money than what is permitted by that law (a). * Since the acquisition of this place it has been taken notice of by several acts of parliament; as by 12. *Car.* 2. c. 26. which is an act for prohibiting planting tobacco in *England*, where it is called a *Colony* and *Plantation* of this kingdom in *America*; and in 15. *Car.* 2. c. 7. an act was made for encouragement of trade; by which it was enacted, "that no commodity of the growth of *Europe* shall be transported to the king's plantations in *America*, but what shall be shipped in *England*." By the statute of 22. & 23. *Car.* 2. c. 26. it is called "an *English* plantation in *America*;" which shews that the general laws of the realm do not extend to it; and therefore this place being not mentioned in the statute of 5. & 6. *Edw.* 6. c. 16. that law has no force there. And for a further proof of this matter the *Earl of Derby's Case* (b) was mentioned, which was thus: *King Henry the Fourth* had the *Ile of Man* by conquest, and by letters patents he granted it to *Sir John Stanley* in fee, in which grant there was a clause that the said *Ile* should be governed by the common law of *England*: afterwards the *Earl of Derby* made a conveyance thereof to uses, &c. and by his last will devised it, &c. and it was adjudged that none of the inhabitants there had any inheritance in their lands except the earl and the bishop; for being governed by their own laws, neither the statute of *Uses* or of *Wills*, or any other act of the parliament in *England*, did bind them without express mention thereof.

* [223]

(a) See the statutes 12. *Ann.* c. 16. P. C. chap. 82. s. 8. and 30.
and 14. *Geo.* 3. c. 79. in 1. *Hawk.* (b) 2. *Anders.* 116.

SECONDLY,

BLANEARD
against
GALBY.

SECONDLY, In the next place it was said, That this is not an office which concerns the administration of justice. It was compared to the bailiwick of a hundred (a), and as such the sale thereof has been adjudged not to be within the statute of 5. & 6. Edw. 6. c. 16. Besides, it is not averred how, or in what matter it concerned the execution of justice.

* [224]

E contra. IT WAS ARGUED for the plaintiff, that in all places there are some methods and rules of government, and that after an absolute conquest, the people are wholly at the will of the conqueror, who may make new or confirm their old laws; but until such laws are made, they shall not be governed by their own laws; because by the conquest their properties are * lost, and their government is dissolved, and by consequence none of their laws remain; therefore the laws of the conqueror must take place; and it is very reasonable that what they enjoy by his permission should be subject to his government and laws. But it is as unreasonable that *Englishmen* should lose their laws by the conquest of a nation, which laws are their birthright, and which they carry with them wherever they go; for if they should, then by the conquest of an Infidel country, their laws must remain, and the *English* laws must be subject to those of the *Alcoran*. But my LORD COKE, in *Calvin's Case* (b), tells us by what laws kingdoms gotten by conquest shall be governed, where he makes a difference as to that purpose between a christian and a heathen kingdom; for by the conquest of the one, their antient laws remain in force till new laws are made by the conqueror; but by the conquest of the other, viz. by christians, their laws are wholly abrogated, because the laws of the heathens are contrary to those of God. So that it seems not to be a question now by what laws THE SPANIARD or natives shall be governed there; for their country being possessed by *Englishmen*, the laws of *England* must take place till the king shall think convenient to make any alteration. In this case the property of the soil is gained by the possessor; but the dominion and government thereof belongs to the crown; and to prove that the *English* laws are in force there, this single instance was offered, viz. A writ of error did lie upon a judgment given in *Ireland* before that kingdom was governed by our laws, which seems to be a parallel case. As to the objection, that they have no representatives in our parliaments, it will signify very little in this case, because the statute of 5. & 6. Edw. 6. c. 16. was made long before the conquest of the island, and therefore the want of representatives can be no reason why statutes which were made before that conquest should not bind there. An *Englishman* accused there of theft is to be tried by a jury, so are all contracts to be tried by the same method, and not by the laws of that heathen country: now this is part of the common law of *England*; and if such laws are used there, what reason can be given why statutes made here,

(a) Godbolt's Case, 4. Leon. 33. (b) 7. Co. 1. Jenk. Cent. 306.
3. Bac. Abr. 730, 731.

should

BLANKARD
against
GALDY.

should not likewise be of force there? * But it is plain that such statutes do bind there, for the statute of Limitations extends to all contracts made in that place. THE HEPTARCHY was subdued by the king of the *West Saxons*, who imposed laws upon the conquered nation, some whereof have obtained ever since; as likewise do those laws which were made by WILLIAM called the *Conqueror*, and it was a long time before the people had any other establishment. In the second year of *Richard the Second*, ALL 7. Rep. 23. THE JUDGES OF ENGLAND met in the *Exchequer Chamber* to consider whether the people in *Ireland* were bound by an act of parliament made in *England*; and they held, they were not as to such things which were done there, but that they were subjects of *England*, and what they did out of *Ireland* must be conformable to the laws of *England*. And for this reason it is not material whether *Jamaica* is part of *England* or not, so long as it is subject to the dominion thereof. It is true, there are many statutes which are not used there, as the statutes of Usury and of Labourers; but these are laws not observed here; and therefore it is not to be objected that they do not bind in *Jamaica*.

SECONDLY, It has been urged in the next place, that it is not said in what manner this office did concern the administration of justice; it is averred in the pleading, that it did concern justice, but it is never shewed how or in what manner. It was also said, that *ex vi termini*, this cannot be called an office, it is only a gaoler; but if that be admitted, it is still within the statute, for no gaoler is excepted out of the act but THE MARSHAL of the *King's Bench* and THE WARDEN of the *Fleet*.

THE COURT. The laws by which the people were governed before the conquest of the island, do bind them till new laws are given, and acts of parliament made here since the conquest do not bind them unless they are particularly named. The reason is, because though a conqueror may make new laws, yet there is a necessity that the former should be in force till new are obtained, and even then some of their old customs may remain (a). By the statute of 27. Hen. 8. c. 27. *Wales* was united to *England*, yet some of their customs still remain; it is so likewise in *Ireland*, which nation, though conquered, yet still retained their old customs, as in the case of *Tanistry*: so that there may be a part of the possessions of the crown of *England* (as the *Ile of Man* is) and yet not governed by our laws.

(a) In the year 1722 it was determined by the privy council, upon an appeal to the king in council from the foreign plantations, that if there be a new and uninhabited country discovered by English subjects, such new-found country is to be governed by the laws of *England*, but that after it becomes inhabited it shall not be bound by English statutes unless specially named. See *Case*, that when the *King of England*

conquers a country, he may impose upon the inhabitants what laws he pleases. But THIRDLY, that until such laws be given by the conqueror, the laws and customs of the conquered country shall hold place, except where they are contrary to the established religion; or enact any thing *malum in se*; or are *silent*; for that in all such cases the laws of the conquering country shall prevail, s. *Peer v. Wms.* 75.

And

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against
CALDY.

* And therefore it was held, that *Jamaica* was not governed by the laws of *England* after the conquest thereof, till new laws were made; for they had neither sheriff or counties; they were only an assembly of people which are not bound by our laws, unless particularly mentioned. In *Barbadoes* all freeholds are subject to debts, and are esteemed as chattels, till the creditors are satisfied, and then the lands descend to the heir; but the law is otherwise here; which shews, that though that island is parcel of the possessions of *England*, yet it is not governed by the laws made here, but by their own particular laws and customs.

And for these reasons judgment was given for the plaintiff.

Case 84.

Matthew against Ollerton.

If a defendant agree to refer the matter to the plaintiff, he cannot object to the award that the plaintiff was a judge in his own cause.

S. C. Comb. 218.
Hard. 44.

DEBT UPON AN AWARD, and a verdict for the plaintiff; and it was now moved in arrest of judgment.

The exception taken was, that the matter in difference was referred to the plaintiff himself, who made an award.

Sed non allocatur. And the case of *Serjeant Harb's* was remembered by DOLBEN, *Justice, viz.* The serjeant took a horse from my Lord of Canterbury's bailiff for a deadawd, and the archbishop brought his action; and it coming to a trial at the assizes in Kent, the serjeant, by rule of court, referred it to the archbishop to set the price of the horse, which was done accordingly; and the serjeant afterwards moved the Court to set aside the award for the reason now offered; but it was denied by LORD HALE and PER TOTAM CURIAM.

Case 85.

Robinson against Watkyns.

Quare, Whether the city of London, under its custom to regulate trades, so as to prevent their becoming nuisances to the public, can make bye-laws to regulate a new affick, such as driving hackney coaches, by limiting them to a particular number?

S. C. Skin. 371.
Raym. 288. 328.
1. Sid. 284.
1. Keb. 463.

THE RETURN of a *habeas corpus* was, That London is an antient city, and that there is a custom in the said city for the mayor, aldermen, &c. to make acts of common council for the better government of the city; that the customs of London are confirmed by act of parliament; that the said mayor and aldermen, &c. being informed that the number of *hackney-coaches* in London was greatly increased, and the trade of the city thereby impaired, did order, that the number of those should not exceed four hundred, and that none should be licensed afterwards but *stage-coaches*; that if any person not licensed stood to be hired, &c. the offender should forfeit forty shillings for every such offence, to be recovered by action of debt to be brought by THE CHAMBERLAIN of the city; that before the levying of the plaint whereupon the defendant was taken, he stood with an unlicensed coach in *Cornehill* to be hired, *per quod actio accrevit, &c.* and that the defendant was taken upon the said plaint, which is the cause of his imprisonment.

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1. Vent. 21. 195. 2. Keb. 27. Comy. 269. Lutw. 562. 3. Mod. 164. 1. Bac. Abr. 339. 302.

It

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IT WAS ARGUED, that this act of common council was illegal; FIRST, by considering the nature and extent of the custom, and what operation is made upon it by the confirmation in parliament, for that gave no new or farther power, or any thing more than what they had before by the custom, which was confirmed but not enlarged. Acts of common council in London are no more than *bye-laws*, they are founded upon the customs used in the city; now they have no custom to warrant this bye-law, and therefore it is void; for it being made by a corporation for a private end, it must have a custom to support it (a): but if it had been for a public good, as for the repairing of a highway, &c. then it might have been well without a custom (b). Then as to the restraining part of this law, it is void, because it is against the liberty of the subject to be hindered in his lawful occupation; and so it was adjudged in the *Taylor of Ipswich's Case* (c). In the case of *Norris v. Stupes* (d), the question was, Whether a town corporate having no prescription to exclude others, could, by any particular privilege, make a law to obstruct all persons from using a trade there, having not been apprentices in the town? This seemed to be against the general liberties of the people, and therefore of no force to bind strangers acting within the liberties of the place contrary to such law; but it did not receive any determination. King Edward the Third, by letters patents confirmed in parliament, gave power to the mayor and commonalty of London to make *bye-laws* for the better regulating of the city, and they made a law that no carman should go into the city without leave of the wardens of a particular hospital under a certain penalty; and this was held void (e), because it restrained men from using of their trades, and was in the nature of a monopoly. It is true, in 32. Eliz. an action of debt was brought in London, grounded upon an act of common council, viz. that if any citizen, freeman, or stranger within the said city shall offer broad cloth to sale there before it is brought to *Blackwell-hall* to be viewed, he shall forfeit 6s. 8d. for every cloth; and this was held (f) a good law to bind strangers: but the reason of that judgment can have no influence upon this case, because that was a good law, made to prevent frauds in selling of cloth not vendible: besides, it was held that they had a power by their custom to make

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(a) 5. Co. 63.

(b) R. Co. 125.

(c) 11. Co. 34. 2. C. 1. Roll. Rep. 4. S. C. Godb. 252. S. C. 4. Vinet. Abr. 305. S. C. 1. Roll. Abr. 564.—See Mayor of Bedford v. Fox, Lutw. 562. Parry v. Berry, Comy Rep. 269.

(d) Mob. 211. 1. Roll. Abr. "Bye-Laws" pl. 4. See 2. Ld. Ray. 2131. 1. Salk. 203. 1. Bac. Abr. 339.

(e) Raym. 288. 1. Sid. 284. 1. Roll. Abr. 364. pl. 5.

(f) Chamberlain of London's Case,

5. Co. 62. S. C. 1. Roll. Abr. 365. S. C. 3. Leon. 264. S. C. 4. Vinet. Abr. 309. See the case of Woolley v. Idle, where a bye-law that no stranger shall use the craft of a taylor in *Bath* except first made free, under a penalty of three shillings and four-pence a day, founded on a custom that no stranger shall use the said craft there unless made free, is good, 4. Burr. 1951. See also Wanel v. Chamberlain of London, Stra. 675. Green v. Mayor of Durham, 1. Burr. 127.

such

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such a law, which is wanting here: and therefore it was prayed that no *procedendo* might be awarded.

E contra. The general question is, Whether it is lawful to restrain the number of *hackney-coaches* in *London* by an act of common council, which was admitted to be no more than a bye-law? And it was argued that this bye-law was lawful.

FIRST, It was insisted that a bye-law may be good in part, and void for the rest, and that though there was no particular *custom* to support this law, yet it was good, as founded upon the general custom of *London* to supply all defects of good government within the city. The customs of that city are very antient, and have been greatly regarded in the courts of justice (a); they have been so far from being construed to restrain trade within their liberties, that they have been allowed even against common right, and against the rules of law; as a custom to arrest a man for debt before it becomes payable has been held good, for it is to make the defendant find better sureties (b). All bye-laws made for a public good are justifiable, for as such they can be no burthen to the people: it is true, where they are made for private ends, or for gain, it is otherwise; but that is not this case, because by this law no private benefit can accrue to the city; it is a law made to prevent a public nuisance: and this was the reason of the judgment in the case of *Hayward v. Pain* (c), which was a bye-law to restrain the carman from going into the city without a licence from the wardens of a particular hospital, because it was a law which had no respect to a public good, but to the profit of the hospital. But for an authority which comes near the case in question this was cited *viz.* A bye-law was made in *London* that there should be but four hundred and twenty carts let to hire, under penalty of forty shillings for every one above that number, to be paid by the owner: now this was a law made in restraint of a lawful employment, yet it was held to be good (d); for if the number should not be restrained, it might prove a nuisance by stopping up the streets, and by hindering the passages. It has been objected, that these are different cases, because such bye-laws which have been held good have been founded upon custom: but no custom can extend to coaches, which have been newly set up. But what reason can be given why a bye law should not be good which is founded upon a general custom to supply all defects of former laws? Many instances may be given where such bye-laws have been held good (e). A bye-law made in *London* that none shall make or use a hot-press there was held good, as founded upon the general custom; so are all the bye-laws made against butchers, prohibiting them from standing in certain streets under a pe-

(a) 2. Co. 126.

(b)

(c) 1. Sid. 284. 1. Roll. Abr. 364.

(d) Raym. 288. 324. 328. 1. Sid.

284. *Sed vide* 1. Roll. Abr. 364.

contra.

(e) 1. Roll. Abr. 365. Godb. 106.

1. Bull. 11. 2. Brownl. 177.

alty.

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nalty (a). It cannot be objected that this is a law to license a nuisance, because the City has adjudged four hundred coaches to be a convenient number. Neither can it be said to be a monopoly, because it is only a restraint of persons beyond such a number to exercise an employment in a particular place, which was always allowed to be good (b). Neither can it with any reason be objected against the authority of the mayor and aldermen to make this bye-law, viz. that *hackney coaches* have been regulated by a statute-law (c), which had made it needless if it could be done by a bye-law; because acts of parliament have been made in confirmation of the common-law, so that things though good in themselves may have occasion to be supported by the legislative power. And lastly, for a late authority the case of *Gavel v. Tasker* (d) was cited, which was a bye-law to restrain carts to such a number as should be licensed by the *Company of Woodmongers*; and this was adjudged in the common pleas 2. Jac. 2. to be a good law, which judgment was affirmed in the exchequer chamber.

Adjournatur (e).

(a) Edwards' Case, 8. Co. 125. S. C. Roll. Rep. 312. S. C. 4. Viner's Abr. 312. But see Rex v. Harrison, 1. Bl. Rep. 372. S. C. 3. Burr. 1324, and Harrison v. Goodman, 1. Burr. 12.

(b) See the case of Sir George Fermion v. Brocke, Cro. Eliz. 203.

(c) 14. Car. 2. c. 2.

(d) Keb. 463. S. C. 4. Viner's Abr. 308.

(e) It is said, S. C. Skin. 384. that afterwards the matter was settled in parliament, and that the city never thought fit to stir further in it.—See 9. Ann. c. 23.; 11. Geo. 3. c. 24. f. 28. 24. Geo. 3. c. 27. f. 1.; 26. Geo. 3. c. 1. 72. In the case of Player v. Jenkins, 4. Viner's Abr. 303. a bye-law made by the city of London, "that

"there should be no more than 420
"carts let to hire in London, on pain of
"forfeiting 40s.," was held good, 1. Sid.
284. 5. Mod. 441. But see the case of
Player v. Vere, Raym. 228. 324.
It is clear, however, that under a general
power to make bye-laws, a bye-law can-
not be made to restrain trade, 1. Burr.
Rep. 16. 131. See the case of the Cham-
berlain of London v. Grosecourt, 5. Mod.
104.; Harrison v. Goodman, 1. Burr. 12.;
Rex v. Harrison, 3. Burr. Rep. 1324.
But a bye-law not being in restraint of
trade, but only in regulation of it, is good.
Bosworth v. Hearne, 2. Stra. 1085.
B. R. H. 405. Andr. 91. Green v.
Mayor of Durham, 1. Burr. 127. Rex
v. Surgeons Company, 2. Burr. 892.
Pearce v. Bartum, Cowp. 270.

ROBINSON
against
WATKINS.

* Pitman against Bidlecombe.

DEBT UPON BOND. The condition was, that if the defendant shall pay all such charges as shall appear to be due to *John Willis* (who was attorney for the plaintiff) in prosecuting the defendant at his suit, that then, &c. The defendant pleaded, that it did not appear what was due to the attorney, &c. The plaintiff replied, that nine pounds was due to the said attorney, of which the defendant had notice, but had not paid it. The defendant rejoined, that it did not appear what was due, &c. and traversed that he had notice thereof.

JUDGMENT was given, upon demurrer, for the plaintiff, because the attorney was a stranger to the action, and the defendant ought 467. 8. Co. 9. Cro. Jac. 492. 684. 1. Bull. 144. Cro. Car. 133. Hob. 14. 1 Sid. 36. 1. Leon. 123. 3. Com. Dig. "Condition" (L. 9.). 5. Com. Dig. "Pleader" (C. 75.). Id. Ray. 750. 1127.

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Case 86.

On a bond conditioned to pay all such costs as shall appear to be due to the attorney of the obligee; it is not necessary to give the obligor notice that so much was due, in order to sustain an action.

1. Roll. Abr.
1. Sid. 36.
(C. 75.). Id.

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PITMAN
against
BIDDLECOMBE.

to take notice at his peril what was due to the attorney; and so it was adjudged in the case of *Dewel v. Wilmot* (a). It is true, where the matter falls under the cognizance of the plaintiff himself, there he ought to give the defendant notice; as an *assumpsit* to pay for part of the goods after the rate the plaintiff should sell the rest, there notice must be given both of the sale and of the price (b); but that is not like this case.

(a) March. 108. 136. 1. Roll, (b) Hob. 51.
Abr. 467.

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Case 87.

* Salter against Brunsdén.

An action upon
the Statute of
distresses for rent
for distraining
where no rent
was due.

NICHOLAUS SALTER queritur de JOHANNES BRUNSDEN et JOHANNES KITE in curia d. mar. &c. de eo quod ipsi decimo sexto die Septembris, anno Domini 1691, apud, &c. in com. præd. vi et armis, &c. bona et catalla videlicet quadraginta quarteria hordei ipsius NICHOLAI ad valentiam quadraginta librarum adtunc et ibidem invent. nomine districtionis pro redditu per ipsum NICHOLAUM præfat. JOHANNI BRUNSDEN super dimissionem messuagii et quarundem terrarum eidem NICHOLAO per ipsum JOHANNEM BRUNSDEN antetunc fact. debuit, et in aretro fore supposit. et pretens. colore cuiusdam actus parliamenti in huiusmodi casu nuper edit. et provis. ceper. et distrinxer. et bona et catalla illa sic district. adtunc et ibidem detinuer. quosque postea scilicet vicesimo tertio die Septembris, anno Domini 1691, supradicto p. æd. bona et catalla colore actus ill. vendider. et disposuer. ubi revera et in facto tempore captionis bonorum et catallorum præd. aut tempore venditionis eorundem nullus redditus per ipsum NICHOLAUM eidem JOHANNI BRUNSDEN debuit, aut in aretro fuit: et alia enormia eidem NICHOLAO adtunc et ibidem intuler. contra pacem dict. domini regis et domine regine nunc et contra formam statuti in huiusmodi casu edit. et provis. unct. cit. quod deteriorat. est et dampnum habet ad valentiam centum librar. Et inde producit. &c.

One defendant
pleads not guilty,
and that is
judgment by default against the
other.

Et modo ad hunc di. m. sci. diem Veneris prox. post crast. Sanct. Trinitatis isto eodem termino usque quem diem præd. JOHANNES BRUNSDEN et JOHANNES KITE habuer. lic. ne. ad billam præd. interloquend. et tunc a. responder. &c. coram domino rege et don in a. regina apud WEST. ven. tam præd. NICHOLAUS SALTER per attorn. suum præd. quam præd. JOHANNES KITE per ANTONIUM ETTRICK attorn. suum. Et idem JOHANNES KITE defend. v. m. et injuriam quondam, &c. Et dicit quod ipse non est inde culpabilis et de hoc ponit se super puriam. et præd. NICHOLAUS similiter, &c. Et præd. JOHANNES BRUNSDEN ad eundem di. m. licet solemniter exat. non ven. nec aliquid dicit in barram sive præclusion. action. prædict. ipsius NICHOLAI per quod idem NICHOLAUS reman. inde versus eundem JOHANNEM BRUNSDEN inactum. &c. ob quod considerat. est quod præd. NICHOLAUS damna * sua versus præfat. JOHAN. BRUNSDEN occasione transg. præd. recuferare debeat. Sed quia Cur. auct. domini regis et domine regine nunc h. c. incognit. ex ipso qua dumna idem NICHOLAUS occasione transg. præd. per præd. JOHAN.

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JOHAN. BRUNSDEN ut præfertur facti. sustinuit; ideo tam ad triand. exit. præd. inter præd. NICHOLAUM et præfat. JOHANNEM KITE superius junct. quam ad inquirend. quæ damna præd. NICH. occasione transgr. præd. per præfat. JOHANNEM BRUNSDEN ut præfertur facti. sustinuit ven. inde jur. coram domino rege et domina regina apud WESTM. die Mercurii præx. post tres septimanas Sanctæ Trinitatis. Et qui nec, &c. ad recogn. &c. Quia tam, &c. idem dies dat. est tam præfat. NICHOLAUM quam præfat. JOHANNI KITE ibidem, &c.

SALTER
against
BRUNSDEN.

Salter against Brunfden.

Case 88.

THIS was an action brought upon the statute of 2. Will. & Mary, c. 5. empowering the landlord to make sale of goods distrained for rent after a certain time therein limited; in which act there is a proviso, "That in case any distress and sale shall be made by virtue and colour of the act, for rent pretended to be arrear or due, where in truth no rent is arrear or due to the person distraining, or to him or them in whose name or right such distress shall be taken, that then the owner of such goods or chattels distrained and sold, shall and may by action of trespass or upon the case to be brought against the person so distraining, recover double the value of the goods and chattels so distrained and sold, together with full costs of suit." The plaintiff had a judgment by default.

An action of trespass, on the 2. Will. & Mary, c. 5. for making a colourable distress, need not state a demise in form; for it is sufficient to say, the goods were taken nomine districtionis.

3. Com. Dig. "Distress" (D. 9.).
2. Bac. Abr. 313.

It was now moved in arrest of that judgment.

The reason offered was, that there must be a lessor and lessee to bring this case to be within the act, and that if there be no demise, the act gives no remedy, because it is expressly declared therein, "That when any goods or chattels shall be distrained for any rent reserved, and due upon any demise, lease, or contract whatsoever, &c. the person distraining may sell the same, &c."

Now there is no demise sufficiently set forth in this declaration, neither is it said that the goods were distrained for rent arrear; but that they were taken nomine districtionis, which is not a good averment that they were distrained.

Ld. Ray. 1774
280.
Stra. 717. 852.
104b.

BUT THE COURT held the declaration to be good.

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* The King and Queen against St. John's College, Cambridge.

Case 89.

BY the statute of 1. Will. & Mary, c. 8. made for the abrogating of THE OATHS of allegiance and supremacy, and appointing other oaths, it is enacted, "That if any governor, master of a college to compel him to take the oaths of the fellows, as prescribed by the 1. Will. & Mary, c. 8; but a mandamus directed to the master and fellows of a college, commanding them to remove out members of the college for not having taken the oaths, is bad, unless the members complained of are *marie parties* to the writ.—S. C. Skin. 359. 368. 393. 545. S. C. Comb. 279. S. C. Hol. 436. Andr. 183. 1. Burr. 538. 2. Term Rep. 773. 3. Bac. Abr. 536.

The court of king's bench will grant a mandamus to the 1. Will. & Mary, c. 8.

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THE KING AND QUEEN
against
ST. JOHN'S
COLLEGE,
CAMBRIDGE.

"head, or fellow of any college or hall in either of the universities
"shall neglect or refuse to take the oaths thereby appointed, for
"six months after the first day of *August*, and before such person
"or persons as by any act or acts are authorised and empowered to
"tender the abrogated oaths, &c. that then the government or
"fellowship of every person so neglecting or refusing shall be
"void."

The abrogated oaths were enjoined by the statute of 25. *Car. 2.*
c. 2. to be taken by "all persons in office, either in the court of
"chancery, or king's bench, or at the quarter sessions for the
"county where he or they shall inhabit."

Several fellows of *St. John's College in Cambridge* had not taken
the oaths pursuant to the statute of 1. *Will. & Mary*, and there-
upon a *mandamus* issued out of this court, directed to *Humfrey*
Gower, who was head of the said college, and to the fellows and
masters there, setting forth the said act, and that such fellows had
not taken the oaths, and that *scut informamur* they still continue
in the quiet enjoyment of their fellowships; therefore by this writ
they were commanded to *remove* them; but it is not said *vel cau-*
sam nobis significetis.

The return to which *mandamus* was the statute of 25. *Edw. 3.*
c. 4. whereby it is enacted, "That none shall be put out of his
"freehold, unless he be duly brought in to answer and be fore-
"judged by the course of the law;" and likewise the statute of
28. *Edw. 3.* c. 3. "That no man shall be put out of his lands or
"tenements, without being brought to answer by due process of
"law;" that the twenty persons mentioned in the writ were, in
the first year of *William and Mary*, sworn fellows of the said col-
lege, and were seised of a freehold in their fellowships, and that
since the making of that statute they were not brought to any trial,
&c. Then it was returned, *quod in nullo modo constat* that they
had not taken the said oaths. It was further set forth, that THE
COLLEGE was founded by *Margaret Countess of Richmond*; that
the *Bishop of Ely* for the time being (a) was by the laws of the
foundress appointed VISITOR; that by some particular statutes of
the * college, which were recited in the return, it is provided,
"That for great crimes, the master, by the consent of the senior
"fellows, upon examination and enquiry, may proceed to an ex-
"pulsion, and that they cannot expel for any other cause; &c."

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Those who argued against the writ held,

FIRST, That it was illegal, and not warranted by any law.

SECONDLY, Admitting the writ to be good, then the matter
returned is a sufficient excuse.

(a) See the case of the Master and
Scholar Fellows of St. John's Cambridge v. Todington, 1. Burr. Rep. 158. 10
205.

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AS TO THE FIRST POINT: *A mandamus* has always been a remedial and beneficial writ to those who have been oppressed, especially where the party grieved could not maintain an *assize*; such writs are called by *Sir Edward Coke*, in *Calvin's Case* (*a*), *brevia mandatoria remedialia*; and they have often been allowed to restore men to places of which they have been dispossessed (*b*), rather than to turn them to actions on the case to be recompensed by a jury in damages. Therefore the proper office of this *mandatory writ* is to restore and keep men in their several places and employments, and not to displace them; but this now brought is so far from being a remedial writ, that it is very mischievous to the parties, for it is to remove them, which is directly contrary to the nature of the writ, and to the opinion of the Court in *Shuttleworth's Case* (*c*), where it was held, that a *mandamus* was only to be allowed in cases of restitution where there have been bad and undue removals. This Court has been always very careful in granting these writs, especially where no precedent (as in this case) can be produced to warrant it; and therefore it was denied (*d*) to be granted to make a man free of a corporation, who had served an apprenticeship there, though the Court held it very reasonable that the person should have his freedom (*e*); and it was likewise denied (*f*) to the spiritual court, who refused to deliver a will to the heir after it was proved in common form, without a definitive sentence; and the reason * in both cases was, because no precedent could be shewed, that ever a remedial writ was granted in such matters; and if no precedent, then there can be no such law (*g*). It is admitted by this writ itself, as well as by the return, that the parties had a freehold in their fellowship; and if the law be more favourable in any one thing than in another, it is in the case of a freehold; and therefore was *MAGNA CHARTA* made to preserve the due course of the common law, to which every *Englishman* has a native right; but this writ does not only infringe that right, but subverts the very course of the law which favours every man's possession; it is to turn people out of their freehold *who are no parties to the writ*; it is to punish a man without being heard; and it is to execute a judgment when it does not appear that any judgment was given, but *sicut informamur*, which is a suggestion of persons unknown against the properties of men; and was never yet allowed. The law is so very careful that persons shall not be dispossessed before they are heard, that parties or privies to a record (as an heir or executor) shall not have an action of debt upon a judgment in a personal action, or a *scire facias* in a real action to have execution, till after the year and day, that the defendants may be called in and have an opportunity to be heard what they can lay to defend their possessions (*h*); and this probably was the reason of making the statute against forcible entries; for though a man be in possession by

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8. Mod. 267.
10. Mod. 54.
12. Mod. 190.

* [235]

Ld. Ray. 807.
1073.

(a) 7. Co. 20. Vaugh. 401.

(b) 1. Sid. 94. 152.

(c) 2. Bulst. 122.

(d) 1. Sid. 107.

(e) But see now 12. Geo. 3. c. 21.

(f) 1. Sid. 433.

(g) Plowd. 262. a.

(h) 2. Inst. 471.

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an illegal title, yet he shall not be turned out before he is heard. But here a possession is endeavoured to be removed by a suggestion or information without an inquisition by a jury, which is against the known rules of law, and expressly against the statutes set forth in the return. It had been much better if the writ had commanded them generally to put the law of 1. *Will. & Mary* in execution; but as this case is, it is like a *mandamus* to an inferior court, commanding them to give judgment *parte inaudita altera*, which would be very unjust, though the party for whom the judgment was given had a right. But this method of proceeding was never intended by the act of 1. *Will. & Mary*; for by that law these persons are only disabled to hold their fellowships which are made void, but the consequences thereof are left to the ordinary methods of the law. Those who have any ecclesiastical benefice are likewise deprived by this act, if they refuse or neglect to take the oaths beyond the time therein limited, but it does not direct the patrons to present after such deprivation; and no man will say that a *mandamus* lies to a patron for that purpose; this would be *festinum remedium*; and yet if a person presented to a benefice refuse to read the Thirty-nine Articles, or come in by simony, his living is as absolutely void as these fellowships. If this should be admitted to be law, how easy would it be to displace the officers of any corporation by such writs; for it is but suggesting an offence and the business is done; the consequences whereof would be so fatal, that it would outdo the late *quo warranto's*, for there the parties had liberty to come in and plead (a). In this case the defendants cannot claim to be heard by the head of the college and the other fellows, because no such thing is commanded by the writ, but absolutely to turn them out; and if the master had power to examine this matter, it cannot be upon oath, for he has no authority to administer it, neither does the writ mention that he and the fellows have power to remove these persons, which ought to have been alledged. Now if the suggestion in the writ should be false, and the fellows thereupon turned out, they have no legal remedy to be restored again; for they cannot have a *mandamus*; and an *appeal* will not lie, because there is a local and proper *reversitor*; neither will an *affize* lie, because it is not a sole corporation; neither can an action on the case be brought against *Dr. Gower*, because what he has done is by the king's command in

(a) See the case of the City of London, 2. Show. 263. 279. 3. State Trials, 545. to 630.—By 3. Ann. c. 20. where any writ of *mandamus* shall issue, the person who is required to make a return shall make such return to the first writ of *mandamus*, and after a return made thereto the person suing out the writ may plead to, or traverse all or any material facts contained in the said return, and the same proceedings be had as if such person had brought an action on the case for a false

return; and if any issue be joined, it shall be tried in such place as an issue in an action might have been tried; and in case a *verdict* be found for the person suing the writ, or judgment be given for him upon *demurrer*, &c. &c. he shall have his cost and damage in like manner, &c. to be levied by *ca. sa. fi. fa. or elegit*; and a *peremptory mandamus* shall be granted without delay, &c. See also 9. Ann. c. 20. s. 4. the manner in which informations in *quo warranto* must now be obtained.

the

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the writ, which is a sufficient authority to justify him. The reason of granting these remedial writs is for want of other means of doing right to injured persons, but here can be no pretence of a failure of justice, because the college is subject to A VISITOR, who has power to execute the laws of the founder; and therefore a *mandamus* will not lie. It has been denied *to restore* a fellow of a college upon undue expulsion; and if so, no reason can be given why it should be allowed *to expel* one who is not well admitted to a fellowship, or unduly continued after a good admission. This is the proper work of THE VISITOR, and not of this court; for the college is subject *ad alitud examen*, therefore the writ ought to have been directed to him who has power of examining and correcting the fellows, and likewise of executing the powers in this act. If therefore this be a remedial writ, and no precedent can be produced where it has been granted *to expel* persons, * but always *to restore* them; if it will not lie where there is a local and proper VISITOR; if the law so far favours a freehold that no man shall be dispossessed thereof by a bare suggestion without a trial; then this writ now brought must be illegal. It is no objection to say, that this court has granted a *mandamus* to abate a nuisance without a trial; it is true it has been done, but then the fact has been made certain either by matter of record, or by a view, or presentment of a grand jury; so it was in *Jacob Hall's Case* (a), who was presented by the jury for a nuisance in the highway, though it was at *Charing Cross* in the view of the Justices coming to WESTMINSTER HALL. It is true also that this court has power to form writs to compel the execution of acts of parliament, but so as always to take care to preserve the rules of the common law.

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8. Mod. 148.
10. Mod. 50.
Ld. Ray. 8.

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Ld. Ray. 277.
608.

SECOND POINT. Admitting this writ to be good, then the matter returned is a sufficient excuse. The return begins with the statute of 25. *Edw. 3. c. 4.* "That no man shall be turned out of his freehold but *per legem terræ*," viz. by due process of law, which is the same thing; and this must be, according to my *Lord Coke* (b), by indictment or presentment of good and lawful men, which was not done in this case, and therefore against law; for this statute is declaratory of the ancient common law, It is true, the statute of 11. *Hen. 7. c. 3.* was made directly against this ancient law, which gives power to justices of assize, or of the peace, upon a bare information, to judge offences without the presentment of a jury; by which law this nation suffered many oppressions for the space of eight years; and therefore in the first year of *Henry the Eighth* that statute was repealed. Next it is returned, that it does not appear to them that the fellows had not taken the oaths; and this may be very true; for by the act of 1. *Will. & Mary, c. 6.* they are enjoined to be taken before such person or persons who by any former law were impowered to tender the abrogated oaths. Now the fellows of colleges were

Strange, 537

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8. Mod. 151.
12. Mod. 232.
Gilb. E. R. 178.
Fitze. 107. 313.
Stra. 913.
2. Peetr. Wm.
325.

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not obliged to take the oath of supremacy in any place by any other act than that of 7. Jac. c. 6. which appoints it to be taken in the halls of their respective colleges; yet this statute was made for their ease; there are no negative words in it to punish them if taken elsewhere; and, being a penal law, it is well fulfilled if they take the oaths in any other place before a proper * person who has authority to administer the same; and therefore since they may be taken in many places, it may not appear to those who made this return that they were not taken in some of these places; and if it do not lie in their knowledge, then ignorance will be a good excuse. There is no act of parliament which enjoins the head of a college to tender, or the fellows to take the oaths before him; for by the statute of 5. Eliz. c. 1. graduates in the universities are appointed to take the oaths in an open place, before a convenient assembly to witness it, or before such persons who have authority by common use to admit them to any degree. Now it is not the head of a house, but the convocation, which admits to degrees in the universities, and there they ought to take the oaths, either in the king's bench, or at the quarter sessions, &c. But admitting they are found to take the oaths in the college hall, yet the master and scholars are not bound by the act to be present, neither is the master at his peril to make any entry or memorandum of it. Then they return, that they have a local visitor, who has power to correct the offences of the college. Now all such *eleemosynary corporations* are visible in their very nature and creation; and if the founder do not give the visitor an authority to determine such offences, yet it is incident to his office; so that there can be no necessity of having any recourse to an extraordinary remedy, because the visitor has as much power to remove an offender by a public act of his own as by the private laws of the college. He has a peculiar and legal power, exclusive of all others, to see that those persons where he is visitor do conform to the laws of the land, and that none be continued there but those who are truly fellows of the college; so that if the fact suggested in this writ be true, then they are no fellows; if so, the visitor, and not this court, must remove them. But if a *mandamus* will lie, MR. ATTORNEY is too early in bringing this, because it does not appear that THE VISITOR was obstructed to make his visitation, or that application had been made to him for that purpose, and that he refused to come, or that his power was too weak; and this makes the case more extraordinary, because the law requires a method in all its proceedings, and deprives no man of that authority which he lawfully has; and therefore where it gives an appeal to the sessions the matter is never begun originally there, for that would be to deprive the justices * of the peace of their legal jurisdiction. So likewise a writ of error out of *Ireland* to the parliament here is never allowed till the matter has first received the judgment of the king's bench in *Ireland*. And lastly they return, that they have not power to expel but for great crimes mentioned in the statutes of the college. So that if they have any power, it must be either

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either by prescription or charter ; they cannot have it by prescription, because the college was founded within time of memory ; and they have it not by charter, because not warranted by their statutes. So that if these persons are expelled from their freeholds it must be done by those who have no power, and before they are called to answer the fact of which they are accused, and likewise before they are tried *per judicium parium vel per legem terræ*, &c. For which reasons it was prayed, that no *peremptory mandamus* might go.

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E contra. The writ is good, and the proceedings thereon are legal for these reasons :

FIRST, From the law itself, and the subject-matter upon which it was made. The act of 1. *Will. & Mary*, c. 8. is a law made for acknowledging the right and sovereignty of their majesties. It is thereby enacted, " That all persons shall be obliged to take " the oaths, &c." It is a law made for the security of the government, and for suspending of the persons, and making of their places void, who refuse to give obedience to it. The open hall of the college is the place appointed by the statute of 7. *Jac.* c. 6.; therefore they who made the return cannot be ignorant of the neglect. It is an offence in those who have the government of the college to suffer men to enjoy their fellowships who have not taken the oaths ; and it is a weak excuse to say, that they had no notice of this matter ; for the act does not put it under any formal examination, neither are these persons to have any notice given of their duty : the statute is sufficient notice, and the neglect of that duty incurs a forfeiture. It is a breach of the law, and of the peace of the government ; it is an encouragement to ill men to contemn authority ; and it is for these reasons that a *mandamus* is good ; for the offenders do as much as in them is to undermine the government, and do despise the wisdom and authority of a parliament.

* SECONDLY, The court of king's bench has a sufficient authority to see this law put in execution ; for the king having an executive power in him for that purpose, has transmitted the same in a more special manner to the king's bench for the preservation of right and justice ; and therefore this court has a sovereign jurisdiction to correct all matters tending to the breach of the peace, which is applicable to this offence, and the remedy now desired is proper (a). It was never yet doubted, but that this court might remove all common nuisances, or any thing done to the prejudice of the public (b) ; and certainly a greater nuisance to the government cannot be than for these persons to continue in the enjoyment of their fellowships in opposition to the laws, and contrary to a positive statute which has made this place void. In the nineteenth year of *Richard the Second* a writ was directed to the chancellor of *Oxford* to expel *Lollards* (c), and particularly

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(a) 4. Inst. 71. Year Books
1. Hen. 4. pl. 19. 3. Hen. 6. pl. 29.

(b) 2. Hawk. P. C. ch. 3. f. 3.

(c) See Riley's Plac. Parliam. 601.

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a man mentioned in that writ ; so that it was then allowed to remove an ill man, and it was obeyed by the universities ; and this may be an answer to the objection made by the counsel on the other side, that a *mandatory writ* has been often granted to restore, but never to turn a man out of his freehold. As to that part of the return which sets forth the statutes of *Edward the Third*, it is in the nature of a demurrer, by which they would dispute the jurisdiction of this court to grant the writ ; it is to deny the statute of 1. *Will. & Mary* to be an act of parliament, or that it is *lex terræ* ; but it is by this law that the avoidance is made ; and if a *mandamus* will lie to restore a man to a place of which he is dispossessed, it will lie as well to turn out such who are actually deprived by the law of the land ; and in such case it would be to no purpose to call them in to answer, or to have a trial *per judicium parium* ; for the act itself is a sufficient conviction, of which they are bound to take notice.

Then as to the return of the visitatorial power, *viz.* that for that reason a *mandamus* would not lie, it was said, that it has been often settled to the contrary.

It is true, that where local statutes are made to punish offences, such are properly cognizable by THE VISITOR, and this court does not usually interpose ; but this is an offence made by act of parliament, which neither the visitor, nor the master, nor the fellows of this college, are proper judges to determine.

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* It is objected, that this is a peremptory writ, commanding the thing to be done, without saying *vel causam nobis significetis*, &c. : but it is said, that these persons had not taken the oaths, *sicut informamur*, and there are several precedents to warrant this form ; but none were mentioned.

CURIA. This statute of 1. *Will. & Mary*, c. 8. has a reference to that of 7. *Jac.* c. 6. ; the one appoints the oaths to be taken before such persons who by any act were authorized to tender the oaths of allegiance now abrogated, and by the other the fellows of colleges *quatenus* fellows are obliged to take them in the open hall, before the president ; and therefore the members must and ought to take notice of such public acts done in their college.

This cannot be taken to be a *peremptory writ*, because it sets forth the fact *sicut informamur*, which words must go to the whole ; and such a construction must be made when the writ is grounded upon a suggestion as this is, but when upon a judgment then it is otherwise.

THE VISITOR is made by *the founder*, and is the proper judge of the private laws of the college ; he is to determine offences against those laws. But where the law of the land is disobeyed, this court will take notice thereof notwithstanding THE VISITOR ;
and

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and in this case the proper way to put it in execution is by this writ of *mandamus*.

Sed adjournatur (a).

NOTE. It was objected, that the return was not *subscribed* by any person, neither was THE COMMON SEAL of the college affixed to it, which, it was insisted, ought to be done, because without it *non constat de personâ* against whom to bring an action if the return should be false. But IT WAS HELD, that *the seal* was not material, because the writ was directed to the head of the college by name; therefore he is the person who is to make the return, and, by consequence, the person against whom the action will lie if the return be false (b).

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If a *mandamus* be directed to the head of a college by name, the return to it is good, though neither *subscribed* by him, nor under the common seal.

S. C. Skin. 368.
1. Salk. 192.

Ld. Ray. 126. 564.

(a) This case was argued again in Trinity Term 6. *Will. & Mary*; and THE COURT being of opinion, that the fellows who were ordered to be removed ought to have been parties, refused, for this cause only, to grant a *peremptory mandamus*. As to the other objection, the judges seemed to think, that the writ was proper enough; for it is the duty of the court of king's bench to see that

the law be executed, and a *mandamus* is the proper writ, S. C. Skin. 549. but as it did not appear but that the fellows might have taken the oaths required at the *quarter sessions*, they refused, on these points also, to grant a *peremptory mandamus*, S. C. Comb. 283.

(b) See the Mayor of Thetford's Case, 1. Salk. 192. in point.

Waples against Bassett.

Case 90.

A SPECIAL ACTION UPON THE CASE was brought against the defendant for not keeping of A BULL and A BOAR; and upon a demurrer to the declaration these exceptions were taken to it:

FIRST, He did not set forth that the defendant was obliged to keep them, either by custom, prescription, or otherwise.

SECONDLY, Neither has he alledged any particular loss or damage by his cattle not increasing.

THIRDLY, Or that the defendant being rector of a church ought to find a *boar* in consideration of paying of him tithes.

For which reasons the declaration was held ill.

Hob. 189. 2. Saund. 116. Ld. Ray. 1091. 1135. 11. Com. Dig. 8vo. 293. 5. Com. Dig. "Pleader" (C. 38.)

S. C. Skin. 399.
1. Roll. Abr.
109. 559.
Cro. Eliz. 569.
Moor, 355.
* [242]
Case 91.

* Pearson against Garrett.

Trinity Term, 5. *Will. & Mary*, Roll 177.

JOHN PEARSON complains of *John Garrett*, being in the custody of the marshals &c. for that, to wit, Whereas the city of London is an ancient city; and also whereas in the same city, to which the drawer promises to pay to him sixty guineas within two months after the drawer shall have married such a person, cannot be sustained unless a legal consideration be avowed; for such a note is not within the custom of merchants. S. C. Skin. 398, Plowd. 308. 1. Salk. 129. 3. Stra. 674. 2. Bl. Com. 446. 3. Burr. 1637. 1670. Bull. N. P. 274. 2. Ld. Ray. 757. Gub. Lq. Rep. 154. 3. Bac. Abr. 606 Comy. 75. 318

An action brought by the payee of a note of hand, by

wit,

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against
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wit, at the parish of *Saint Mary le Bow*, in the ward of *Cheap*, there is and hath been, from time immemorial, an ancient and laudable custom, approved and used in the same, between merchants and other persons inhabiting in the same city, namely, that if any person inhabiting in the said city shall make any bill or note in writing subscribed under his hand, and by the same bill or note he should promise to pay any person any sum of money at any time or any times in the same bill or note mentioned, such person who made the same bill or note, by the same promise and consideration aforesaid, among merchants and other persons aforesaid, so as aforesaid used and approved, is bound to pay the same sum of money in the same bill or note mentioned to the same persons to whom promise of payment thereof by the same bill or note was made to pay the same at the time or times in and by the same bill and note for payment thereof is denoted, according to his promise aforesaid. AND WHEREAS, on the twenty-first day of *October*, in the fourth year of the reign of the *Lord William* and the *Lady Mary*, the now king and queen of *England*, &c. at *London* aforesaid, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap* aforesaid, the same *John Garrett* was a person residing in the city of *London* aforesaid, and so there residing on the same twenty-first day of *October*, in the fourth year aforesaid, in the parish and ward aforesaid, by a certain note in writing, subscribed with his own proper hand, promised to pay to the same *John Pearson*, or his assigns, sixty pounds (a) within two months next after the aforesaid *John Garrett* should be lawfully married to one *Elizabeth Petty*, that is to say, fifty pounds thereof for himself the aforesaid *John Pearson*, and ten pounds thereof for his wife. And the same *John Pearson* in fact saith, that the aforesaid *John Garrett* afterwards, TO WIT, on the twenty-eighth day of *February*, in the fifth year of the reign of the said lord the now king and lady the now queen, at *London* aforesaid, in the parish and ward aforesaid, to the said *Elizabeth Petty* was lawfully married; by which, and by force of the custom aforesaid, the aforesaid *John Garrett* became bound to pay to the said *John Pearson* the said sixty pounds, according to his promise aforesaid; and thereupon, in consideration of the premises, the aforesaid *John Garrett*, then and there, TO WIT, on the aforesaid twenty-eighth day of *February*, in the fifth year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John Pearson*, then and there, that he the said *John Garrett* the aforesaid sixty pounds to the said *John Pearson*, within two months next after the marriage aforesaid had, well and truly to pay and satisfy. Nevertheless the aforesaid *John Garrett*, not regarding his promise and undertaking aforesaid, but contriving and fraudulently intending the said *John Pearson* in this behalf craftily and subtilly to deceive and defraud, the said sixty pounds, or any part thereof, to the said *John Pearson* hath not yet paid, although to do it the said *John Garrett* afterwards, TO

(a) In the original it is, "*sexaginta* "score pieces of guinea twenty shillings
"*pecias auri cuncti*; *ANGELIC*, three- "pieces of gold."

WIT,

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WIT, on the second day of *May*, in the fifth year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by the same *John Pearson* was required; but the same *John Garrett* to pay him the same, or him for the same hitherto in any wise to satisfy, hath altogether refused, and yet doth refuse. Therefore the said *John Pearson* says, that he is thereby injured, and hath received damage to the value of one hundred pounds. And therefore he produces the suit, &c.

PEARSON
against
GARRETT.

To this declaration the defendant demurred, and the plaintiff joined in demurrer.

The action was brought upon a note for the payment of sixty guineas when the defendant should marry such a person, &c. in which the plaintiff declared, as upon a bill of exchange, setting forth the custom of merchants, &c.

Str. 516. 591.
762. 1151.
1217. 1271.

The exceptions taken were, *viz.* that the plaintiff does not aver that he was a merchant, or that the note was made *secundum consuetudinem mercatorum*; neither has he laid any consideration (a).

* This is not such a custom amongst merchants of which this Court is obliged to take notice as part of the law of the land; for in truth there is no such custom; it is only an agreement founded upon a brokerage, and therefore cannot be within the custom of merchants; neither was there ever yet any precedents to pay money upon such a collateral contingency. It is no more than a voluntary note given with a present consideration; and if such should be allowed to be within the custom of merchants, then every thing which is given without a consideration may be as well within the custom, which would quite change the law.

* [244]
8. Mod. 265.
307. 362.
10. Mod. 286.
294.
11. Mod. 180.
12. Mod. 15.
36. 320.

E contra. The question is, Whether this custom be good or not? It is sufficiently alledged in the declaration; it is not laid to be *inter mercatores* only, but *inter alias personas residentes, &c.*; and if such a custom can be good, then it is admitted to be so by the demurrer. *Dr. Witherley's* son brought the like action upon a note; and he was a gentleman, and no trading merchant, but travelling into *France*, and had judgment, which was affirmed in the exchequer chamber (b). No reason can be offered why such a note should not bind as well as a bond, since the consideration for which it was given was very just; for it is lawful for one man to help another to a wife.

Ld. Ray. 175.
281. 744. 759.
1481.

THE COURT. If the note had been given by way of commerce it had been good, but to pay money upon such a contingency cannot be called trading, and therefore not within the custom of merchants.

(a) See the first volume of Mr. Fonblanque's Edition of Barlow's Treatise of Equity, p. 334, 335. *notis.*

(b) *Sarsfield v. Witherley*, 1. Show. 125. Comb. 45. 2. *Venus*, 292. 295. Holt, 113.

Judgment

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FRANSON
against
GABRIEL.

Judgment was given for the defendant (a).

(a) By 3. & 4. Ann. c. 9. "All notes in writing signed by any person, whereby such person shall promise to pay to any other person, or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be due and payable to the person to whom the same is made payable, and shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants; and the person to whom such money is, by such note, made payable, may maintain an action for the same as upon an inland bill of exchange, drawn according to the custom of merchants, against the person who

signed the same; and the person to whom such note is indorsed may maintain his action for the money, either against the drawer or any of the indorsers, as in cases of inland bills of exchange." This act, being for the benefit of commerce, is to be liberally construed, 3. Will. 1.; but no notes are within the benefit of it, unless they would, as bills of exchange, have been within the custom of merchants. Martin v. Channery, 2. Stra. 271. Bull. N. P. 273. Joscelyne v. Laffere, Fort. 281. Jenny v. Hale, 8. Mod. 265. Jeffries v. Austin, 1. Stra. 674. Kyd on Bills of Exchange, §3. to §7.; and see Beardley v. Baldwyn, 2. Stra. 1151. in point.

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Cafe 92.

Gale against Till.

Executors and administrators, if plaintiff in the original action, are not liable to costs on error, though the judgment be affirmed; but in such case, if they are defendants in the original action, they are liable to costs in error.

3. C. 3. Lev. 375-376.
3. C. Comb. 228.
3. C. Carth. 281.
3. C. Skin. 400.
1. Mod. 77.
1. Vent. 166.
B. R. H. 371.
367.
Stra. 977.
Cafes 1. H. 367.
1. Bac. Abr. 218. 518. 523. 3. Com. Dig. "Costs" (B.). Run. Eject. 147. 2. Bac. Abr. 446.

AN ADMINISTRATOR brought a writ of error to reverse a judgment against himself; but the judgment was affirmed.

A motion was now made that he should pay costs, because it was his own fault to bring a writ of error to delay the plaintiff, and to put him to charge; and where an administrator is guilty of any wrong or injury done, which lies within his own knowledge, and which he might prevent, there, if judgment be against him, costs must be paid. * As if an administrator should bring trover and conversion for the goods of the intestate, and the conversion happens to be after the administration granted, and judgment against him, in such case he shall pay costs (a). It is true, there is a case reported by JUSTICE CROKE wherein the law was held to be otherwise (b): the case was thus, viz. An executrix brought a writ of ravishment of ward, and issue being joined upon the tenure it was found against her; three Judges held that she should not pay costs, of whom the reporter says that JUSTICE HUTTON was one; but that Judge, in his own Reports, declares himself to be of another opinion in the same case (c), with whom JUSTICE YELVERTON agreed, that costs should be paid; and their reason was, because the action was brought by the executrix upon her own possession, and for an injury done to herself by taking away the ward, whose marriage did belong to her; so that this can be

(a) Atkey v. Heird, Cro. Car. 219. S. C. Jones, 241. Worfield v. Worfield, Latch. 220.—See also Comy. Rep. 162. Caf. Pr. C. 8. 61. Barnes, 132. B. R. H. 204. Tied on Costs, 45.
(b) Peacock v. Steer, Cro. Car. 29. See also 3. Lev. 60. 6. Mod. 94.

(c) S. C. Hutton, 78. under the name of Townley v. Steel, where it appears, that the plaintiff, after evidence, was nonsuited.—But see Eaves v. Moscato, 1. Salk. 314. Barret v. Winchcombe, Cro. Jac. 361. Featherstone v. Attybone, Cro. Eliz. 503. and Hutton on Costs, 177.

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no authority against the payment of costs in this case. All the cases which mention costs not to be paid by an executor or administrator are where the action is brought in the right of another, viz. upon contracts (*a*), obligations (*b*), or other specialties (*c*), or things made to the testator himself, and for which the executor brings the action; but where the suit is founded upon their own contracts, and a verdict against them, or they suffer a nonsuit, they must pay costs (*d*).

CALP.
against
TILLY

E contra. The judgment against this executor is in *autre droit*, and therefore, as it has been said, no costs shall be paid; it is a recovery *de bonis testatoris*, and the writ of error now brought cannot be called an action in his own right; for it is to reverse that judgment, and to have a restitution to the testator's estate, not for his own use, but for the performance of the will. The authorities cited on the other side are not applicable to this matter; they only prove that costs shall be paid by an executor where he declares upon an immediate *test* done to himself, and found against him; but this writ of error is brought to have relief in the testator's own cause.

CURIA. By the statute of 3. Jac. 1. c. 8. it is enacted, "That no execution shall be stayed by a writ of error, unless the plaintiff in the said writ give bail to the plaintiff in the action in double the sum recovered, to pay the debt, and damages, and * costs, if the judgment should be affirmed." It is always held, that an administrator who brings a writ of error shall not give bail (*e*), though he is not exempted by the statute; neither shall he pay costs in this case (*f*).

* [246]

(*a*) See Cro. Jac. 229. 2. Bullst. 261. 2. Stra. 878. 3. Willf. 24. 3. Burr. 1586. Sayer on Costs, 97. Tidd on Costs, 44.

(*b*) Hayworth v. David, Cro. Jac. 221.

(*c*) Barret v. Winchcombe, Cro. Jac. 362.

(*d*) Therefore if an executor declare on a trover and conversion in the testator's life-time, and also on a trover and conversion after his death, and the evidence offered is only applicable to the first count, he shall not pay costs though he be nonsuited; but if a plaintiff name himself executor when he need not, and fail, he shall pay costs, Cockeril v. Kyaston, 4. Term Rep. 277. See also Latch. 214. 8. Mod. 109. 3. Salk. 105. 2. Stra. 785. 1107.

(*e*) Coan v. Bowles, Ante, 7. Cherwin v. Venner, 1. Sid. 183. Goldsmith v. Plat, Cro. Jac. 350. Fitzwilliams v. Moor, 1. Sid. 568. 1. Lev. 245. Legg v. Richards, 1. Vent. 166. Siltorn v. Wynne, B. R. H. 307. 2. Stra. 1072. See also Cro. Car. 59. 1. Bullst. 284. Lit. 3. 4. Burr. 1928.

(*f*) S. C. 3. Lev. 375. S. C. Carth. 281. 1212, that the administrator in this

case was *defendant*; but in S. C. Comb. 228. it is said, that he was *plaintiff* in the court below, with which S. C. Skin. 400. seems to agree; and all the Reports agree, that the Court held he was not liable to costs. In Easter Term 2. Geo. 2. however, where an executor was *defendant*, and judgment was given against him *de bonis propriis*, which judgment was affirmed on error, Lord Hardwicke held, that the case of *bail* did not govern in cases of *costs*, and that executors and administrators being, when *defendants*, liable to costs in original actions, are also liable to costs in error, Caswell v. Norman, 2. Bar. K. B. 450. 2. Stra. 977. So also in Hilary 31. Geo. 3. where judgment *de bonis testatoris* was given against an executor, and on error the judgment was affirmed, the court of common pleas unanimously adopted the distinction, that executors and administrators, when *plaintiffs*, are not liable to costs in error, but that when they are *defendants* they are liable; because as *plaintiffs* they are not, but as *defendants* they are, liable to costs in the *original action*. Williams v. Ryley, 1. H. Bl. Rep. 566. See also 6. Mod. 92. Bull. N. P. 332. 1. Willf. 172. 2. Term Rep. 477. Hullock on Costs, 174.

Case 93.

Ellery against Hicks and his Wife.

Trefn. is by original is good, although only one battery is recited in the writ, and two in the declaration.

Cro. Jac. 655.
Cro. Car. 327.
3. Mod. 136.
Jones, 442.
Ld. Ray. 4. 62.
618.

ASSAULT AND BATTERY was brought by *original* against *husband and wife*. In the writ there was but *one* battery mentioned, and the plaintiff declared upon *two*, viz. one made on *the first*, and the other on *the second of January*; and that the defendant set on his dog to bite the plaintiff. **THE HUSBAND** pleaded, as to the setting on of the dog *not guilty*, and as to the batteries *son assault demesne*. **THE WIFE** pleaded, that the plaintiff and her husband were quarrelling, and that in order to part them *she manus imposuit, &c. ut bene licuit*. The plaintiff replied, *præcludi non, &c. quia die et anno, &c. in narratione mentionat, &c. de injuriâ suâ propriâ insultum fecerunt, &c.* There was a verdict for the plaintiff at the assizes in Cornwall.

It was now moved in arrest of judgment, and the exceptions taken were,

FIRST, The action is brought by *original*, in which there is but one battery laid, and two in the declaration, and so there is a plain *variance*.—But this exception was disallowed, because the defendant shall not take advantage of an ill *original* without demanding *oyer* of it, which he had not done; besides, it is only by way of recital in the declaration; it is like *attachiatus fuit (a)*, which is naught in an action of *debt*, but being only a recital it has been held good.

Discontinuance of pleading helped by the verdict.

8. Mod. 243.
30. Mod. 283
11. Mod. 171.

230.
Ld. Ray. 1209.
1220. 1523.

SECONDLY, There are two batteries laid in the declaration on several days, to which the defendant pleaded *son assault, &c.* and the plaintiff has replied but to one, viz. *die et anno, &c. de injuriâ suâ propriâ*.—This exception was also disallowed, because it is only a *discontinuance*, and helped by *the verdict (b)*. It had been otherwise upon a *demurrer (c)*.

So the plaintiff had his judgment.
Fitzg. 96. 174. 275. 5. Com. Dig. "Pleader" (C. 14.).

(a) Cro. Jac. 108. Cro. Car. 91. (c) Yelv. 6c. 1. Saund. 338.
and Brown v. Morgan, Fort. 341. 5. Com. Dig. "Pleader" (E. 1.).

(b) By the statute 32. Hen. 8. c. 30.
See 4. Co. 62. 1. Com. Dig. "Amendment" (1.).

• [247]
Case 94.

* Dighton against Granvil.

Amendment.
Ld. Ray. 151.
553. 704. 879.
2209

AJUDGMENT was obtained in the reign of **KING JAMES** in an action commenced in the reign of **KING CHARLES THE SECOND**, and debt was brought upon the judgment in the court of king's bench after a writ of error allowed, which writ was, "*QUIA in recordo et processu ac etiam in redditione judicii "loquelæ quæ fuit in curiâ nostrâ, &c."*"

The judgment and continuances being in *King James's reign*, and the writ of error supposing all to be done *in tempore regis nunc*, an objection was made, that the record was not well removed,
for

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for it ought to be "*in redditione judicii loquela quæ fuit in curia*" "*nuper domini regis*," because the *loquela* was begun in his reign.

DIXTON
against
GRANVILLE.

But PEMBERTON, *Serjeant*, insisted, that this was amendable by the statute of 8. *Hen.* 6. c. 12. especially since the word "*loquela*" might extend to the whole.

And it was amended accordingly.

THEN the defendant pleaded "a writ of error depending, and the record certified into THE EXCHEQUER CHAMBER." To which plea the plaintiff demurred.

To an action of debt in the king's bench on a judgment, the defendant cannot plead in abatement that there is a writ of error depending, and that the record is certified into the exchequer; for only a transcript of the record is removed.

* [248.]
S. C. Carth. 3.
158.
S. C. 2. Vent.
321. 333.
S. C. Comb.
50. 77.
S. C. Skin. 260.
Skin. 388. 590.
1. Vent. 261.
Lut. 602.
Carth. 1.
1. Show. 98.
146.
1. Sid. 236.
Ray. 100.
Carth. 136.
243.
10. Mod. 17.
1. Ld. Ray. 47.
2. Ld. Ray.
1017.
1. Peer Wms.
685.
3. Peer Wms.
148.
Comy. 321.
Stra. 632.
2. Com. Dig.
"Debt" (A.2.)
5. Com. Dig.
"Pieauver"

It was now argued for him, that this is no plea, because debt will lie in the court of king's bench after a writ of error brought, and so it has been adjudged. The reason is, because by the writ of error *the transcript* only, and not *the record* itself, is removed; for if the judgment should be affirmed in the exchequer, the execution must be awarded in the court of king's bench, where the record of the original judgment remains (a). It has been an opinion, that if error be brought in the court of king's bench upon a judgment obtained in the common pleas, debt will not lie upon that judgment in that court pending the writ, because the record itself is removed, and so there can be no foundation for an action of debt there; but the reason is not the same in the king's bench, where *the record* is not removed, but *the transcript* only. But even this opinion is against the old books, viz. In 4. *Hen.* 6. a writ of annuity was brought, and the plaintiff obtained a judgment; the defendant brought a writ of error in the court of king's bench, and, pending that writ, the plaintiff brought an action of debt upon the judgment in the common pleas for a *nomine pæne* in not paying the annuity upon a day certain; the defendant pleaded the writ of error depending; but a *respondeas ouster* was awarded (b). * So in *Easter Term*, in the eighteenth year of *Edward the Fourth* (c), an action of trespass was brought in the common pleas, and the parties were at issue whether the plaintiff was the defendant's villein or not, and it was found for the plaintiff; thereupon the defendant brought a writ of error in the king's bench; and, pending that writ, the plaintiff in the original action brought debt in the common pleas upon the judgment; and it was then objected, that such an action would not lie, because there was no record of any such judgment before the court, that being removed by the writ of error; but the Judges were of the contrary opinion; for they held, that the judgment, though removed, was in force till reversed.

CURIA. At the common law, before the statute of *Westminster the Second*, if execution had not been sued upon a judgment in any personal action within a year and a day, the party must then have brought an action of debt upon that judgment; for he

(2. W. 39.). 4. Bac. Abr. 681. 1. Term Rep. 273.

(a) 1. Sid. 236.

(c) 18. *Edw.* 4. pl. .

(b) See the Year Book 8. *Hen.* 6. pl. 31.

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DIGHTON
against
GRANVIL,

could have no *scire facias* upon that judgment (a); but now that statute applies a proper remedy by giving the *scire facias* upon the judgment after a year and a day; and it has been held, that "a writ of error pending" was a good plea in abatement to such a *scire facias*. But of late days that has been over-ruled; though it has been said, that if there be a judgment precedent to a statute from the same person, who dies, and afterwards a writ of error is brought upon the judgment, and, pending that writ, the money due upon that statute is paid, and there is enough remaining to satisfy the judgment creditor, the first payment to the cognizee is good, because by the writ of error the execution of the judgment was suspended.

But in this case the *demurrer* was held good; and afterwards the defendant was ruled to *answer over* (b),

(a) See *Hullock on Costs*, 302. and the cases there cited.

(b) But although "a writ of error pending" cannot be pleaded to debt on a judgment in the king's bench, *Rogers v. Mayhoe*, Carth. 1. *Abdy v. Buxton*, Carth. 197. 136. because the transcript only, and not the record itself, is removed, *Adams v. Tomlinson*, 1. Sid. 436; yet the Court will, under certain

circumstances, stay the proceedings in the action until the writ of error be determined. See *Tafwell v. Storey*, 4. Burr. 2454. *Grebb v. Abbot*, Cowp. 72. *Entris v. Shepherd*, 2. Term Rep. 78. *Christie v. Richardson*, 3. Term Rep. 78. *Pool v. Charnock*, 3. Term Rep. 79. *Kempland v. Macauley*, 4. Term Rep. 436. *Evans v. Gilbert*, 4. Term Rep. 436. *notis*.

Case 95.

An inquisition for a forcible entry is good, although it be not stated that the jurors were then and there sworn and impanelled.

* [249]
2. Mod. 65.
11. Mod. 52.
235. 273.
12. Mod. 417.
455. 516.
Stra. 443. 474.
Ld. Ray. 440.
483. 610/ 936.

An indictment for forcible entry must state that the tenant of the freehold was omitted.

The King and Queen against Waite.

A MOTION was made to quash an inquisition for a forcible entry. The exceptions were,

FIRST. It is said, *per sacramentum duodecim, &c. jurat. et impanellat. &c.* and does not say *ad tunc et ibidem jurat. &c.*; for if the time and place are not sufficiently ascertained the inquisition cannot be good, because the fact may be committed above a year past. And a case in *Dyer* (a) was cited for this purpose, viz. In the fifth year of *Edward the Sixth* * one *Buckler* was indicted and outlawed for murder in the court of king's bench, *de eo quod* such a day and year, at such a place, he made an assault upon *B.* *et ipsum cum quodam cultello, &c. felonice percussit occidit et murdravit*, without saying *ad tunc et ibidem*; and for this reason the indictment was adjudged to be ill.

But notwithstanding this authority the exception was not allowed in this case, because it is not material here to shew the place, &c.; for the party could not be *amoved* so as to make the defendant guilty of a forcible entry from any other place but from the land.

SECOND EXCEPTION. By the statute of 8. Hen. 6. c. 9, restitution is to be granted where the tenant of the freehold only is put out of possession; and the statute of 21. Jac. c. 15. makes no alteration of any former law, but only grants restitution where a

(a) *Dyer*, 69. 2. But see the argument in *Vaux Case*, 4. Co. 44. b. where *Buckler's Case* is denied to be law.

See also 2. Hawk. P. C. ch. 25. l. 78. *Rex v. Morris*, 2. Stra. 901.

termor

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termor for years, &c. is put out of possession. Now in this case it is not said that the tenant of the freehold was ousted, but that the lessee for years was ousted; and it was compared to a case in the king's bench, in *Michaelmas Term 28. Eliz. viz.* There was a lessee for years and a reversioner, and an indictment was brought upon this statute, setting forth, that the defendant *expulit et disseisivit* him in reversion, *et quendam J. S. tenentem expulit*, which last word was applied to both, and two cannot be expelled where but one is in possession; and therefore it should have been, that the tenant of the freehold was disseised, and the lessee for years expelled.

THE KING
AND QUEEN
against
WAITE.

And for this reason the indictment was held to be naught by DOLBEN and EYRE, *Justices, ceteris absentibus.*

Griffith against Harrison.

Case 96.

THERE was a covenant in an assignment of a lease, "that the assignee shall quietly enjoy, &c. free and clear of and from all arrears of rent." An action was brought upon this covenant, and the breach assigned was, "that the rent was arrear, and not paid."

To covenant for enjoyment free from arrears, A PLEA that the defendant delivered money to the plaintiff, *ad intentiones* to pay it to the lessor, is good.

The defendant pleaded, that he left so much money in the hands of the plaintiff *ad intentiones* to pay it over to the lessor in discharge of what rent was then in arrear, &c.

And upon a demurrer to this plea it was held good, notwithstanding the objection that *the intention* was put in issue; for if it had been *ad solvendum*, it would have been good; and in this case the plaintiff might have replied, *non reliquit, &c. in manibus suis ad solvendum. &c.*

S. C. Skin. 397.
S. C. Salk. 196.
9. Co. 25.
2. Walf. 74.
Gillb. E. R. 252.
2. Stra. 1194.
1. Pac. Abr. 551.

5. Com. Dig. "Pleader" (E. 34.). (S. V. 13.). 1. Pac. Abr. 551.

• [250]

* Perry against Odingsell.

Case 97.

INDEBITATUS ASSUMPSIT for payment of money upon a note, and on a certain day.

To an *indebitatus* upon a note, the defendant cannot plead, that after it was due he paid so much in satisfaction.

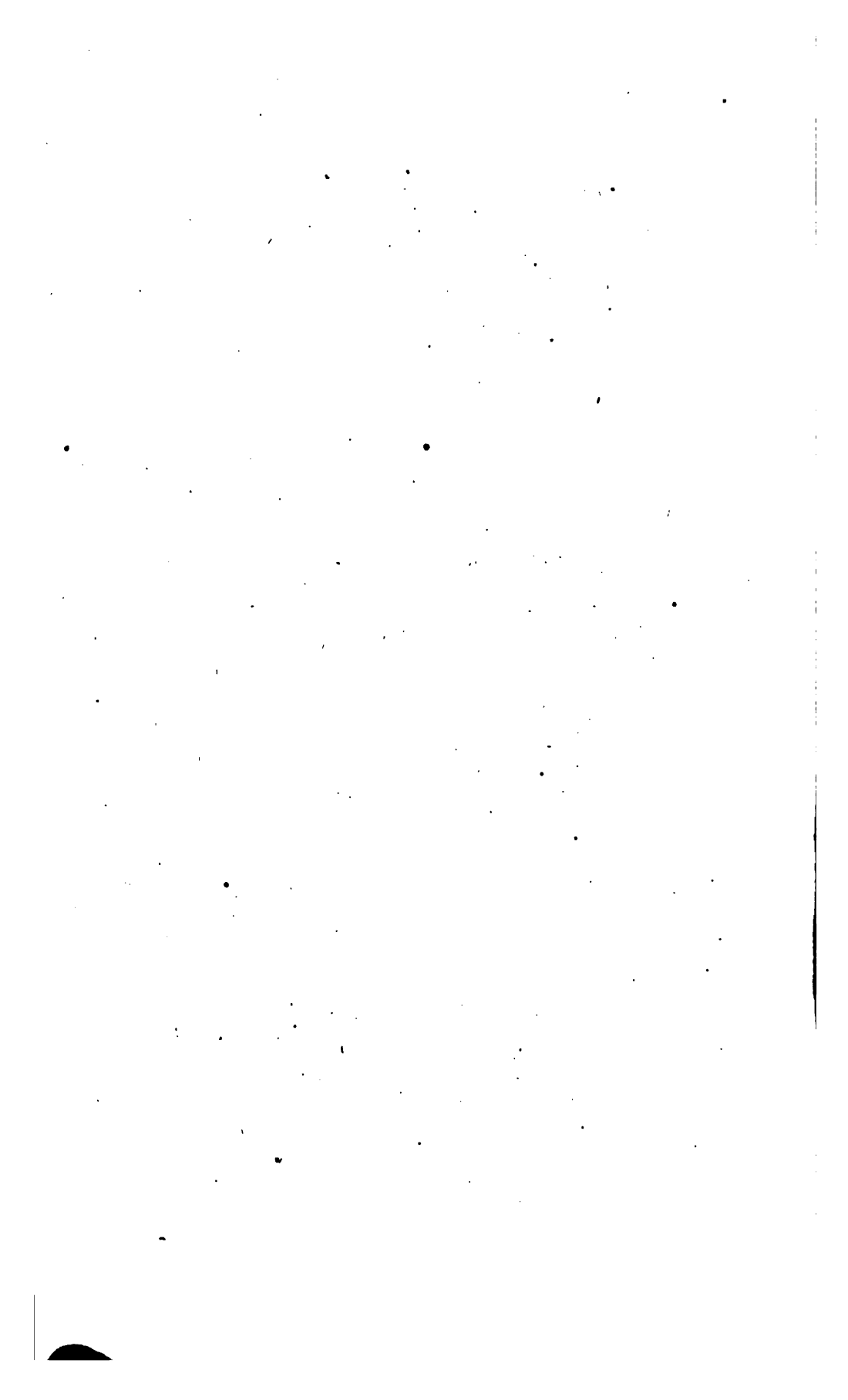
The defendant pleaded in bar, that after the day of payment was incurred, he paid so much money in satisfaction of what was due upon the note,

Ante, 88.

And upon demurrer this was held to be no good plea, because after the action is vested you cannot plead *exoneravit*; for payment after the day is good by way of *discharge*, but not by way of *satisfaction*.

1. Roll. Abr. 32.
Cro. Jac. 483.

1. Com. Dig. "Assumpsit" (G.). 1. Com. Dig. "Accord" (B. 1.). 5. Com. Dig. "Pleader" (2. G. 15.). 5. Term Rep. 141.



HILARY TERM,

The Fifth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Edward Ward, *Esq. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

* *Benson against Scott.*

* [251]
Case 98.

EJECTMENT for copyhold lands in *Essex*. Upon not guilty pleaded, the jury found a special verdict, the substance whereof was, *viz.* as to four acres mentioned in the declaration they find the defendant *not guilty*, and as to the residue they find that it was parcel of the manor of *Witherfield* in the county of *Essex*, and held of the said manor by copy of court-roll, &c.; that before the ejectment brought, *viz.* on the third day of *October* 1690, *Samuel Scott* was seised to him and his heirs by copy of court-roll of the lands in question, and being so seised did the same day surrender it into the hands of the lord of the manor by the hands of *Edward Barker* and *John Pryer*, two customary tenants of the said manor, to the use of *Barbara Callard* and her heirs, with a condition to be void upon payments of one hundred and seventy-five pounds upon the twentieth day of *August* following. They find that the surrender was duly presented at the next court in the life-time of the said *Samuel Scott*, and that he did not pay the money at the day, or at any time before or since; that he died; and that *Martha Scot* the defendant was his widow. They find that after the death of the said *Samuel Scott*, the aforesaid *Barbara Callard* was admitted to these

A copyhold estate surrendered on a condition to be void on payment of a sum of money, will, on non-performance of the condition, defeat the wife of the surrenderer of her free-bench; for by the custom of the manor she is intitled to free-bench in those lands only of which her husband died seised.

S. C. 3. Lev. 335.
S. C. Salk. 185.
S. C. Comb. 233.

S. C. Skin. 406. 2. C. Carth. 275. S. C. 12. Mod. 49. S. C. Holt, 160. 1. Roll. Abr. 508. Foph. 105.

BENSON
against
SCOTT.

lands, * and surrendered the same to the use of *Richard Scott*, the lessor of the plaintiff, who was heir at law to *Samuel Scott*, and that the said *Richard Scott* was admitted, &c. They find the custom of the manor, that if any copyholder die seised of copyhold lands having a wife at the time of his death, that such wife shall hold the said lands during her widowhood for her *free bench*; then they find that the said *Martha Scott* was admitted to all the copyhold lands of which her husband died seised, to hold the same during her widowhood, and that she is still a widow: they find that the lessor of the plaintiff made a lease to him, &c. and that the defendant ejected him, and so made a general conclusion, &c.

The question upon this special verdict was, Whether the surrenderee, though admitted after the death of *Samuel Scott*, the surrenderor, shall hold this estate against the widow, who was thus entitled by the custom of the manor?

. It was argued that he shall,

FIRST, Upon the construction of the custom itself, which is, that the widow shall enjoy the land in the same manner as her husband held it in his life-time; but he might alien or extinguish his right; if so, that which will determine his estate, will likewise put an end to her title.

SECONDLY, From the nature of copyhold estates; for admittances to such estates shall have relation to all mesne acts; and therefore the admission of the surrenderee in this case shall have relation to the surrender; but if no admittance had been made, the very acceptance of the rent by the lord after a surrender is an admittance in law of him to whose use the surrender was made (a).

To prove these two points a case was mentioned which was adjudged in the king's bench in *Hilary Term* in the fifteenth year of *Charles the Second* (b): The custom of a manor was, that the wife of a copyholder dying seised should have her widow's estate; it happened that in the tenth year of *Charles the First* a statute of bankrupt was taken out against the copyholder, and the commissioners sold the estate by a deed of bargain and sale enrolled; in the twelfth year of *Charles the First* the copyholder died; and his widow was admitted before the bargainee, who thereupon brought an ejectment; and it was adjudged that by the conveyance the estate was vested in the bargainee before admittance; which proves that a copyholder may extinguish his right so as to bind the estate of the widow; in which case it was also held, * that after the bargainee was admitted it had relation to the sale, and should divest the widow of that right which she might have by the custom. If there be two joint-tenants of a copyhold, and one surrender out of court to the use of his will, and devise his moiety

4. Vent. 564.
609.

8. Mod. 334.

9. Mod. 106.

10. Mod. 492.

1. Wms. 16.

280. 330.

Str. 445.

Co. Lit. 59.

* [253]

2. Vern. 367.

585. 680.

10. Mod. 163.

31. Mod. 57-70.

32. Mod. 297.

(a) 1. Roll. Abr. 505. 3. Bulst.
214.

(b) Parker v. Edith Blacke, Cro.
Car. 568.

Hilary Term, 5. William & Mary; In B. R.

to a stranger, and dies, and afterwards this surrender is presented at the next court, &c. the devisee ought to be admitted, for by the surrender and presentment the jointure was severed, for the land was bound by the surrender by way of relation (a). The heir and the widow are both by custom, and the widow's estate is no more than a continuance of her husband's.

Benson
against
Scott

E contra. The widow's title commences from her marriage, and shall not be defeated by any subsequent act done by the husband after the coverture. The case of a bankrupt copyholder is not at all pertinent to this; for the widow was divested of her estate there, because her husband did not die seised, the estate being sold before his death. It is true; an admittance refers to the surrender; and likewise to all acts between the parties; but not to a third person, as the widow is; it shall never relate to destroy a precedent right, which is not consummate till the death of her husband. If a man marry, and afterward make a bargain and sale of his land and die, then the deed is enrolled, the wife in such case shall be endowed. Now nothing passes from the surrenderor till the admittance of the surrenderee (b): for till then neither the lord himself, or the person to whose use the surrender was made, but only the surrenderor, continues in possession; so that the plaintiff in this case has but an inceptive title; and therefore shall not defeat the widow.

Ld. Ray. 630.
726.

CURIA. The widow's title does not commence by the marriage; if it did, then the husband could do nothing in his life-time to prejudice it; but it is plain he may alien or extinguish his right; as in the case of bankruptcy before mentioned: The *free-bench* grows out of the estate of the husband; and it is his dying seised which gives the widow a title; and as the husband had a defeasible estate, so the wife may have her *free-bench* defeated. * There is no difference between this case and that of joint-tenants of a copyhold; for as by a surrender by one joint-tenant and a presentment thereof the jointure is severed; and the estate is bound by the surrender by way of relation; so in this case the admittance shall relate to the surrender; and the estate is thereby divested (c):

* [254]

Judgment for the plaintiff, *absente* GREGORY, *Justice.*

(a) Co. Lit. 59.

(c) See the case of Salisbury v. Hurd;

(b) Cro. Eliz. 349. Yelv. 16.

Cowper, 481.

Coombs against Talbott:

Case 99.

Michaelmas Term, 5. Will. & Mary. Roll.

DEBT FOR RENT upon a demise of a house and lands at the rent of nine pounds a-year.

To debt for rent,
A PLEA of nil
debet as to part,
and nihil in ten-
mentis as to part,
is double and
2. Vent. 68.
4. Term Rep. 194.

The action was brought for two years in arrear. The defendant pleaded as to the nine pounds part thereof *nil debet*, and as to repugnant.—S. C. Salk. 218. S. C. Holt, 549. Yelv. 13. Cro. Eliz. 606. 5. Com. Dig. "Pleader" (E. 2.). 1. Ld. Ray. 746. 2. Wils. 314. 4. Term Rep. 67.

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COOMBS
against
TALBOT.

21. *Han.* 7. pl.
21.
Ld. Ray. 357.
902.
10. Mod. 280.
335.
11. Mod. 218.
Comy. 222. 561.
Fitzg. 189.
Stra. 425. 496.

the other nine pounds he confessed the demise as laid in the declaration, *reddendo annuatim* nine pounds for a piece of land called *Chalwell*, and forty shillings for other lands, and seven shillings for another parcel, &c. and *quoad* forty shillings part thereof *nil debet*; and as to the rest, *nil habuit in tenementis*.

And, upon a demurrer, the plea was held to be ill, because in construction of law, "*nil habuit in tenementis*" goes to the whole, though pleaded as to part; and having likewise pleaded *nil debet*, that makes the plea double (a); for upon *nil debet* the defendant might give in evidence "*nil habuit in tenementis*;" but by pleading "*he owed nothing*," the demise was admitted; and then by saying the plaintiff *had nothing in the lands, &c.* that made the plea double and repugnant; but he should have traversed the whole demise (b).

(a) See *Collier v. Stipton*, Year Book
3. *Han.* 6. fo. 19. a. case 30.

(b) By the 4. *Han.* c. 16. "any defendant or tenant in any action or
"suit, or any plaintiff in replevin, in

"any court of record, may, with the
"leave of the same Court, plead as
"many several matters as he shall think
"necessary for his defence."

Cafe 100.

Johnson against Oxendon.

A proctor cannot sue in the spiritual court for his fees.

S. C. Comb.
237.
Skin. 589.
Bunb. 170.
5. Mod. 238.
1. Salk. 333.
1. Mod. 167.
Doug. 629.
* [255]
6. Com. Dig.
"Prohibition"
(F. 5.).
4 Bac. Abr.
256.

PROHIBITION was prayed to THE ARCHES, to stay a suit commenced there for fees.

Against which it was said, that they are the proper and best judges of their own fees, which generally arise by constitutions provincial; and for this reason a prohibition was denied in the common pleas to a proctor who libelled in the spiritual court for his fees (c); and for the like cause it was denied in the king's bench in *Hilary Term*, in the sixteenth year of *James the First* (d); and the reason then given was, that it is just a proctor should be recompensed for his trouble and charge, though a suit was commenced in a court christian for a * cause of which that court had not an original jurisdiction. It is true, in *Hilary Term* 35. & 36. Car. 2. the court of exchequer made a question in this matter, but afterwards they refused to grant a prohibition in the case of *Skelton v. Lee* (e); and since that time the court of common pleas would not prohibit them in the case of *Frogget* the official of *Wells v. Jesselin* (f).

But on the other side it was argued, that courts of common law take notice of proctors fees; and to prove this, they cited *Dr. Lake's Case* (g), who, being a *commissary*, was indicted for extortion for taking eleven shillings and sixpence for absolving an excommunicated person; and an exception was taken to the indictment.

(c) *Horton v. Wilson*, 1. Mod. 167.

(d) 2. Roll. Rep. 59.

(e)

(f) *Hilary Term*, 2. *Will. & Mary*.

(g) 3. Leon. 263. Ld. Ray. 149.

ment

Hilary Term, 5. William & Mary, In B. R.

ment because it did not set forth what *fee* was justly due, and for this reason it was quashed. CHANCELLORS, REGISTERS, and PROCTORS, are officers of temporal profit, whose fees do not relate to the jurisdiction of the spiritual court; there is a proper remedy at law to recover them; and therefore a prohibition was prayed.

JOHNSON
against
OXENBOW.

CURIA. It is custom and not the authority of constitutions which entitles proctors, &c. to take fees, for which an action will lie at the common law, and therefore the spiritual court ought to be prohibited.

1. Vern. 203.
10. Mod. 263.
12. Mod. 172.
Stra. 1108.
Ld. Ray. 450.

The rule was, that they should declare upon the prohibition (a).

(a) See the case of Pollard v. Gerard, where it is admitted that prohibitions had been granted to stay suits in the spiritual court for proctors' fees, 1. Ld. Ray. 703. It is also determined

that a *register*, 1. Ld. Ray. 703. 2. Salk. 333. 12. Mod. 608.; a *parish clerk*, 2. Stra. 1108.; an *apparitor*, Dougl. 829. cannot sue in the spiritual court for their fees, 2. Mod. 168. *voir*.

Goodright against Cornish.

* [256]
Case 101.

SPECIAL VERDICT in *ejectment*. The case was thus: *John* If a devise be *knowing* was seised in fee of the lands in question; and had made of land to issue two sons, *John* and *Richard*. The father devised the lands *A.* the eldest son to *John* his eldest son for *fifty years*, if he should so long live (which of the testator, term was to commence after the death of the testator), and after the for *fifty years*, if determination thereof, then to the heirs males of the body of the he should so long live, to com- said *John*; and for want of such issue, then to his second son in tail, mence after the &c. remainder to the right heirs of the devisor. The father died. death of the *John*, the eldest son, suffered a common recovery of these lands, with remainder to the heirs male and declared the uses to himself for life, and to the heirs males of of the body his body, and for want of such issue to the defendant and his heirs. of the said *A.* * *John* died without issue; and *Richard* died leaving issue a son and for want of that name. of such issue, with remainder over; the remainder to *A.* is void; for it is contingent, and has only an estate for years to support it.

The question was, Whether *John* the eldest son had an *estate tail* by this devise? If he had, then the recovery was well suffered to dock that estate, and it shall be a good bar to the remainders.

S. C. 1. Salk. 226.
S. C. Holt, 227.
S. C. Comb. 254.
S. C. Skin. 408.
S. C. 12. Mod. 52.
S. C. 1. Ld. Ray. 3. Ante, 155.
1. Co. 130. Moor, 488 710.
3. Co. 20. Ray. 83. Poph. 4.
3. Atk. 774. 3. Wbl. 227. 241. 4. Com. Dig. "Estate" (B. 14). 2. Bl. Com. 171.
4. Bac. Abr. 310.

IT WAS ARGUED against the estate tail, that the nature of this devise was by express limitation for fifty years, so that what the eldest son had more, must be by implication; for the term was only designed for him; but where the intent of the devisor is apparent in the will, no construction shall be put upon his words, so as to make any estate arise by implication. The legal construction of these words is to expound the devise of the inheritance to be an *executory devise*: it cannot be a *remainder*, because a freehold must depend, and be supported by a freehold; but here the particular estate being but a term for years, it is too weak to

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support a remainder. This was the opinion of DYER and MANNING, in *Mich. 29. Eliz.* in the common pleas (a); that a remainder in such cases was void, because there is no person who can take presently; but if the lease had been made for life with a remainder to his right heirs, then he would have a fee executed; so that in this case *John* cannot have an estate tail executed, because the limitation to him by way of remainder was void in its creation. To prove that *John* took up an executory devise, they cited *Matthew Manning's Case* (b), which was thus: *Edward Manning* was possessed of a term which he devised to his wife for life, paying every year seven pounds to *Matthew Manning*, and after the death of his wife he devised it to *Matthew*, and made his wife executrix; she proved the will, but had not assets *ultra* the term to pay the debts of the testator; the executrix assented to the legacy; and paid it constantly to *Matthew* during her life; she died intestate, and administration *de bonis non* of *Edward* was granted to *Matthew*, against whom a creditor of *Edward* brought an action, and upon *plene administravit* pleaded, the question was, Whether the residue of the term was assets in the hands of *Matthew* to pay the debts of the testator? This matter was found specially before COKE, Chief Justice, at Guildhall; and upon arguing of it in the common pleas, WALMSLEY, Justice, was at first of opinion, that the devise to *Matthew* was void, because the whole * term was devised to the executrix for life, who might have survived the same, and there was only a possibility that she might die within the term and *Matthew* survive, which possibility could not be limited by way of remainder; but it was adjudged, that it did vest in *Matthew*, not as a remainder, but by way of executory devise, which in judgment of law shall precede the disposition of the term till the contingency shall happen; as if he had said, "If my wife die within the term, then *Matthew* shall have the residue," and farther had devised it to her for life. The same point was adjudged three years afterwards in the same court in *Lampett's Case* (c), which was thus: *John Morrice* was possessed of a term for five thousand years in a house, &c. he devised the house, &c. to his father for life, remainder to *Elizabeth* his sister, and to the heirs of her body, and made his father executor, and died; the sister married *William Taylor*, and then the husband and wife released to the first devisee: it was objected, that *Elizabeth* having only a possibility to have this term after the death of the executor, such possibility could not by the rules of law be released to him in possession: but it was adjudged, that she had more than a possibility, because she took by executory devise, which vested an interest immediately in point of law, though not to take effect till the contingency should happen; and therefore by this release their right was extinguished, and they had absolutely perfected the whole term in the executor, which before was determinable by his death. Now in the case at bar, if

(a) 4. Leon. 22.
(c) 10. Co. 42.

(b) 8. Co. 94.

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there had been a limitation over to the right heirs of *John*, the remainder could never have vested in him, but his right heirs would have taken by way of *purchase*, because *John* their ancestor had no freehold, but only a lease for years; but if he had a freehold for life with a remainder to his right heirs, then the fee had vested in him, because then those words "right heirs" would be words of limitation of the estate, and not of purchase (a). This is like a covenant to stand seised for twenty years, remainder to the heirs of the body of the covenantor, which is an executory remainder, and to be barred by a common recovery.

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against
CORNISH.

* *E contra*. Such a construction must be made of this devise, that the will may have its effect; and it is a known rule in law, that it shall not be construed by way of *executory devise*, if it will admit of any other construction. This is therefore a *remainder vested*, or otherwise it must be void; it is an estate tail in *John* of necessity by implication, because of these words, "for want of such issue;" and it makes no difference whether those words follow an estate for life or for years, so as the limitation is to the heir. A devise to his wife for life, remainder to *William*, and if he have issue male of his body, then to such issue, and if no issue male, then to *Samuel*, &c. so to *Thomas* in *totidem verbis*; it was adjudged (b) that every one of the sons had an estate tail, because of the words "if no issue male," which are sufficient to create such an estate; and yet there was no freehold for life devised to the issue, but only a devise generally. The like resolution was in *Trinity Term*, in the seventh year of *James the First*, in the king's bench, in the case of *Robinson v. Miller* (c), which was a devise to the wife for life, remainder to the son of the testator, and if the son die without having a son, remainder over, the son had an estate tail by this devise. There is as much reason that an estate should arise by implication here, as in that known case of *Pybus v. Mitford* (d); and it is not material whether the lease for years is drowned by the reversion in fee descending upon *John* the eldest son and heir of the devisor; for the limitation being to "the heirs of the body of *John*," and he being likewise heir at law to the testator, so much of the old inheritable estate shall arise to him by implication which may make him a tenant for life, and then he has an estate tail executed in him. A man having two sons by several venters (e), covenanted to stand seised to the use of his heirs males begotten on the body of his second wife (without any precedent limitation of an estate for life) remainder to his own right heirs; and it was adjudged that *an use* did arise to the son of the second wife, because an estate for life did arise to the covenantor by implication, and this was by operation of law; for a limitation to the heirs of his body is in effect to himself (f), and then the case is no more than a limitation to himself for life, and to the heirs males of his body

• [258]

2. Vent. 54. 536.
8. Mod. 253.
10. Mod. 132.
402. 376.
11. Mod. 207.
Fitzg. 30. 112.
Comy. 82. 372.
539.
Cases T. T. 10.
262.
1. Peer Wma.
54. 142. 290.
2. Peer Wma.
471.
3. Peer Wma.
178. 258. 300.
Stra. 130. 427.
729. 802. 849.
1092.

(a) Co. Lit. 329.

(b) *Sunday's Case*, 9. Co. 127.

(c) 1. Roll. Abr. 837.

(d) 1. Mod. 121. 156.

(e) 1. Mod. 121. 156.

(f) *Davis v. Speed*, 2. Mod.

begotten

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begotten on the body of his second wife; and this was the case of *Pybus v. Mitford*. * So a devise to *S.* from *Michaelmas* next for five years, remainder to *A.* and his heirs; *S.* dies before *Michaelmas*; this was adjudged (a) a good remainder in contingency, because it being in the case of a will, the freehold shall be in the heir of the devisor till the contingency happens. So here this shall be a good devise to the heirs of the body of *John* by way of *contingent remainder*, and in the mean time the freehold shall not be in *abeyance*, but shall descend to him being likewise heir of the devisor. Agreeable to this is a very late resolution (b) of both the courts of law in Westminster Hall, which was thus: *John Long* being seised in fee, devised to *Henry Long* for life, then to the first son of *Henry*, and to the heirs males of the body of such first son, &c. and for default of such issue, to *Richard Long* for life, with like remainder in tail male, remainder over, &c.; the devisor died, and *Henry* entered and died without issue male, but left his wife with child of a son; then *Richard* entered, and afterwards the son was born, who brought an ejectment; those who argued for him, would have it to be an *executory devise*, and that the freehold should vest in *Richard* until the son was born; but it was held to be a *contingent remainder*, and there being no particular estate in *Henry* to support it, therefore it was adjudged void; for otherwise, if it had been an executory or a springing remainder (as it was called) in one, it would be so in all the devisees, and that would be to introduce perpetuities: so here, to construe this to be an executory devise would be to introduce the same mischief, and to elude the force of a common recovery, which is one of the chief assurances of the kingdom.

2. Vern. 131.
370.
10. Mod. 419.
1d. Ray. 314.
354.

CURIA. This cannot be an *executory devise*; if it should, then the limitations over are void; it must therefore be a *contingent remainder*, and then it is void, because there is nothing but a term for years to support it.

And afterwards in *Easter Term* judgment was given for the plaintiff.

(a) Noy, 43. Cro. Eliz. 878.

4. Will. & Mary, Post. 132. See also

(b) Reve v. Long, in Easter Term 4. Bac. Abr. 312.

Cafe 102. * The King and Queen against St. John's College in Oxford.

On a motion for a *mandamus* to admit a scholar to a college, if it be doubtful whether the visitor have

A MANDAMUS was prayed to the President of the college, &c. for that *White*, who was THE FOUNDER thereof, had appointed that there should be a President and fifty scholars there, whereof three-and-forty should be named by particular schools in *London*, and seven more by three cities, of which *Bristol* was to

power to refuse, the Court will grant the writ and order the *statutes* to be returned.—S. C. post. 368. S. C. Comb. 238. S. C. Holt, 436. 10. Mod. 50. 62. 12. Mod. 232. 1d. Ray. 338. 335.

name

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same two; that one *Basterville*, being a scholar of that college, had surrendered his place; by reason whereof that city had a right to name another; that they named one *King* to succeed him, who was refused by the college; and that they had chosen a person in his stead; and therefore prayed a *mandamus*.

THE KING
AND QUEEN
against
ST. JOHN'S
COLLEGE IN
OXFORD.

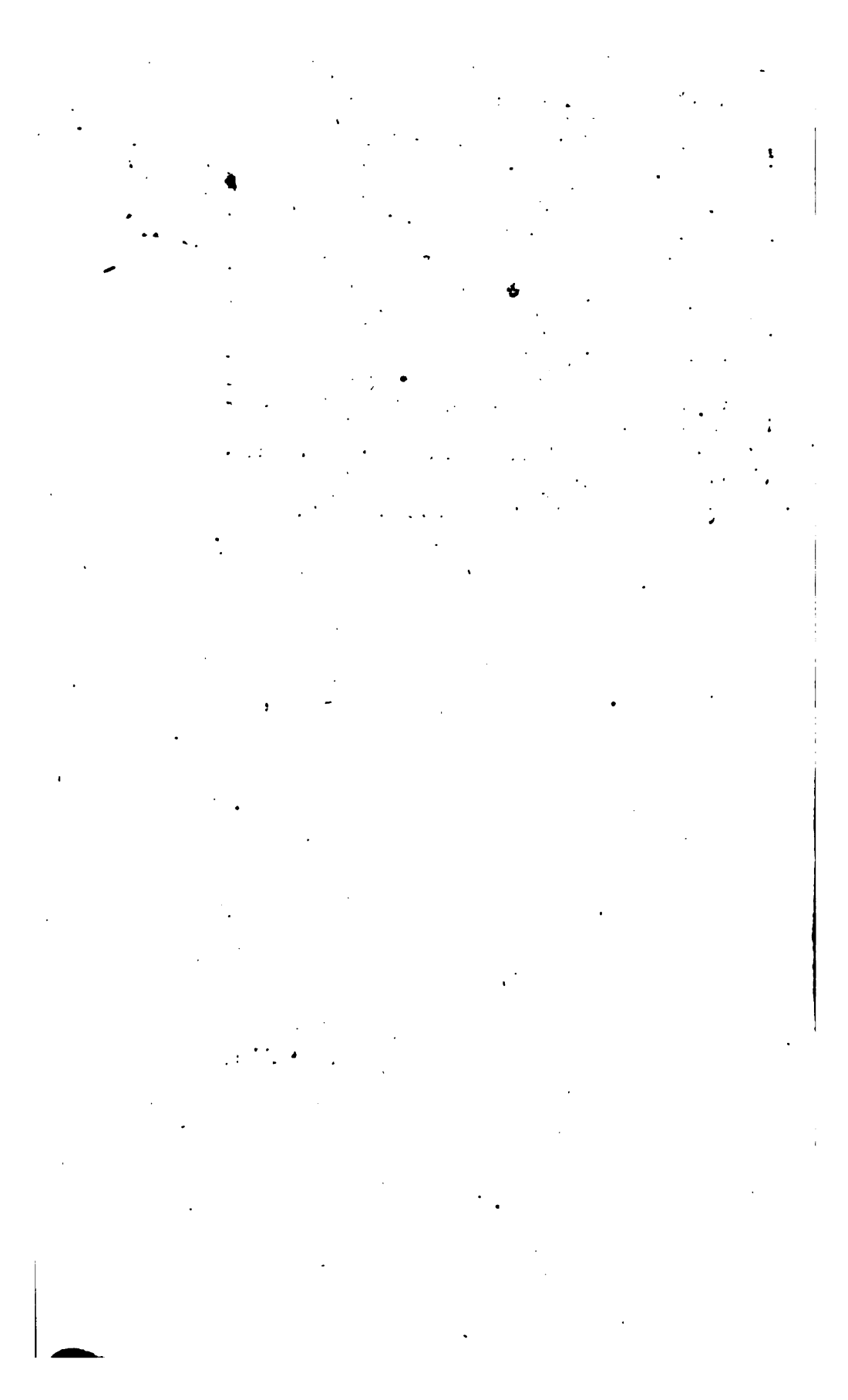
It was objected that such writs have been granted in doubtful cases, but not where A VISITOR is appointed, which in this college is *the Bishop of Winton*, and he is to determine all things concerning that foundation.

But it was answered, that the person who desired this *mandamus* was only a *nominee*, and not yet of the foundation, and therefore THE VISITOR had no power over him till he came to be a member of the college.

THE COURT ordered the statutes of the college to be returned; *et adjournatur* (a).

(a) See the return made by the college to this writ, post, 362.

EASTER



E A S T E R T E R M,

The Sixth of William and Mary,

I N

The King and Queen's Bench,

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt,

Sir Giles Eyres, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Edward Ward, Knt. Attorney General.

Sir Thomas Trevor, Knt. Solicitor General,

* Jones *against* Morley, Knt. of the Bath and Bart.

* [261]
Case 103.

IN trespass and ejectment for the manor of *Frensham*, in the county of *Surrey*, a verdict was found, the substance whereof was as follows :

An indenture made between husband and wife on the

Ann Bowyer was seised thereof in fee; and by indentures of lease and release bearing date the twenty-second and twenty-third day of *January* 1664, and made between *Edward Morley*, who was brother to the defendant, of the first part; the said *Ann Bowyer* of the second part; and the defendant *Sir William Morley* and *John Wells*, of the third part, in consideration of a marriage then intended between the said *Edward* and *Ann*, and of a settlement of lands to be made by the said *Edward* in jointure of the yearly value of three hundred pounds, she the said *Anne* conveyed the said manor to the defendant *Sir William Morley* and *John Wells* and their heirs, &c. in trust for the said *Anne* and her heirs until the said marriage should take effect, and until such settlement in jointure should be made; and from and after such marriage and settlement,

twenty-ninth of *January* 1664, reciting that a fine is already agreed to be levied the next *HILARY TERM* to such and such uses, is a good declaration of the uses of a fine levied in the *Hilary Term* 1664.

S. C. Comb. 429.
S. C. 2. Salk. 677.

S. C. Comy. 29. 47. S. C. 1. Ld. Ray. 287. S. C. Carth. 410. S. C. Holt, 321. S. C. 12. Mod. 159. S. C. Show. P. C. 140. 2. Roll. Abr. 788. 793. Co. Lit. 111. 112. 9. Co. 11. 5. Co. 26. Cro. Jac. 27. Poph. 4. Moor, 107. 786. Cro. Eliz. 218. 300. Lut. 226. 3. Peer Wms. 206. 6. Com. Dig. "Uses" (D.) (D. 3.). 5. Bac. Abr. 356. 358.

then

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then to the use of the said *Edward Morley* and his heirs. * Afterwards the said marriage was had; and then by indenture bearing date about a year after, viz. the twenty-ninth day of *January*, 17. Car. 2. anno 1665. and made between the husband and wife of the one part, and *Richard Young* and *John Trusser* of the other part, it is recited, " THAT WHEREAS a fine is already acknowledged and agreed to be levied the next *Hilary Term*, by the said *Edward* and *Anne*, of the aforesaid manor, it was declared " that the uses thereof should be and enure to the said *Edward* and " his heirs." But before the said fine was levied, viz. on the thirty-first day of *January*, being two days after the date of the former deed, there was another deed made between the husband of the one part, and the wife of the other part, by which they covenanted and agreed to make void all former agreements, contracts, writings, and deeds whatsoever, until the husband should fulfil the covenants in the marriage settlement of the twenty-third day of *January*, and for default thereof, that the said *Anne* and her heirs should enter and hold the premises. The fine was levied in the same *Hilary Term* in which the deed to lead the uses thereof was dated, viz. on the ninth day of *February*; they find that three hundred pounds *per annum* was not settled upon the said *Anne* in jointure by *Edward Morley*, but only two hundred and fifty pounds *per annum*, and that charged with an annuity of fifteen pounds *per annum* to another person. In *July* following, viz. in the year 1666, *Edward Morley* mortgaged the premises to one *Doble* for six hundred pounds, and the year following he died without issue; and *Anne* survived about twenty-one years, and is since dead without issue. *Sir William Morley* the defendant, as brother and heir at law to *Edward*, entered after the death of *Anne*, and discharged the mortgage made to *Doble*. And now the plaintiff *Henry Billingham*, as cousin and heir to *Anne Bowyer*, brought the ejectment.

The questions upon this special verdict were,

FIRST, Whether by the deed dated on the twenty-ninth day of *January*, any use was raised to *Edward Morley*, because it was dated in *Hilary Term*, and it declared the uses of a fine of "next " *Hilary Term* following," which must be a year afterwards, and therefore that fine levied in the same Term in which * that deed was dated cannot be to the uses in that very deed; and for this the case of *Whetstone v. Wentworth* was cited, where it was held, that if a recovery be suffered *Octab. Mich.* and then an indenture, dated 14 *November* next ensuing, declares, " that all recoveries hereafter to be suffered between the parties shall be " void," this word " hereafter " excludes all recoveries suffered before, without averring the intent of the parties that it should be otherwise. It is true, precedent indentures shall direct the uses of recoveries, and other conveyances made afterwards (a); but no reason can be given why the uses of the fines and reco-

(a) Lord Cromwell's Case, 2. Co. 71.

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veries should not likewise be guided by subsequent deeds; and that they are so guided it was said, that in the sixth year of *Henry the Eighth* a *feme sole* suffered a common recovery, and, being about to marry, declared the uses thereof to be immediately after marriage to her husband and herself and their heirs; afterwards they and the next heir of the wife by indenture (taking notice that she had no issue) declare their intent to be, that notwithstanding the former deed; the heirs of the body of the woman should have the land, and that therefore they would stand seised thereof to themselves in special tail; remainder to the right heirs of the *feme*; and it was adjudged that by this second deed the uses of the recovery were changed.

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against
MORLEY.

Dyer, 306.

BUT THE CHIEF QUESTION WAS, Whether the deed of the thirty-first of *January* did not revoke and controul that of the twenty-ninth preceding, because it was made and executed before the fine was levied? for it is not a fine till engrossed, and then and not before the uses are raised; but before that time the parties were come to a new agreement; and therefore no use could arise to *Edward* by the deed of the twenty-ninth of *January*.

If an indenture declare the uses of a fine, and afterwards another deed be made between husband and wife, declaring other uses, the fine shall be to the use of the last deed.

And as to this matter it was said, that there was some difference to be made where a fine is levied, and the uses thereof declared by a *subsequent* deed, varying in some circumstances from the fine; for in such case the party himself and his heirs (though not a stranger) is bound, and cannot aver it to be to any other use than is declared in that deed. But where the deed declaring the uses of a fine is *precedent*, and then a fine is levied varying from such deed, there all parties are at liberty to aver against it, because the fine stands singly by itself; and this is now the case at bar. * It is a very immaterial objection to say, that this deed of the thirty-first of *January* is void, because made only between husband and wife; for it is a writing which will amount to a deed-poll (*a*), it is an agreement shewing the intent of the parties; and it is therefore sufficient to declare the use of a fine (*b*); for A USE is a creature of equity, and therefore any agreement between the parties, by which their intentions do plainly appear, has been held to be a good appointment of a use, though void to operate as a deed (*c*); as a bargain and sale not enrolled pursuant to the statute, or a feoffment without livery, so as it is made between the parties, and of the same lands. And as such agreements are sufficient to declare the uses of a fine, so a *parol-agreement* will be good to hinder the raising of a use where there is a manifest and plain variance between *the deed* and *the fine* (*d*), as there is here; and therefore if this deed of the thirty-first of *January* amounted to no more, it is not only a sufficient declaration of the uses of this fine to the wife and her heirs, but it hinders any use arising to the husband; and the rather, because the deed of the twenty-ninth of

1. And. 126.
1. Vern. 40.
141. 214. 415.
2. Vern. 61.
- 328.
10. Mod. 245.
- 412.
11. Mod. 181.
- 196.
12. Mod. 444.
- Gillb E. R. 16.
- Fitzg. 301.
- 1 Peer. Wms.
- 264.
2. Peer. Wms.
- 243.
3. Peer. Wms.
- 189.
- Cases T. T. 41.
- 167.

* [264]

6. Com. Dig.
- 8vo. 461.
2. Will. 19.
- Doughl. 2. 44.

(a) 2. And. 58.

(b) Com. Dig. "Uses" (D. 1.).

(c) Moor, 789. 512.

(d) 2. Roll. Abr. 251. 1. And. 240.

1. Leon. 210. Cro. Eliz. 219. Savil, 124.

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January reciting the fine did not declare any uses to him; for there never was any such fine levied as is therein recited, viz. "a fine of the then next *Hilary Term* after the date of the deed;" for the fine levied was in the same *Hilary Term* wherein the deed was dated. Besides, that deed of the twenty-ninth of *January* was only directory, and the uses therein declared were at all times revocable till the fine was levied; and therefore this intermediate deed of the thirty-first of *January*, being another direction and declaration of the parties, and coming before the fine was actually levied, is not only sufficient to revoke those former, but to declare new uses to the wife and her heirs.

E contra. It was argued for *Sir William Morley*, that this fine and deed of the twenty-ninth of *January* made but one conveyance, and that there was no deed intervening declaring other or any uses which did not consist with those declared by that indenture: That there must be a favourable construction made of deeds, according to the common and reasonable intentions of the parties, though there may be some room for a private intendment; but no man can think that these persons did intend this fine should be levied a year after the date of the deed; it is neither agreeable to reason or the usual practice amongst men, to have fines levied so long after the dates of deeds.

* [265] * Then as to the matter it was said,

FIRST, That this *deed* and *fine* made but one *conveyance*, and that there was no variance between them.

SECONDLY, That the uses were well directed by the deed of the twenty-ninth of *January*.

THIRDLY, That they were not revoked or altered by the subsequent deed of the thirty-first of *January*, made between the husband and wife.

AS TO THE FIRST POINT it was agreed, that *the fine* was the superior act which drew *the deed* to it; they are both between the same parties, and concern the same lands, and therefore are but one conveyance. It was so adjudged in the case of *Wigson v. Garret (a)*: The *Earl of Leicester* by deed dated 21. *Eliz.* covenanted to levy a fine, &c. to trustees to the use of himself for life, and after his death the lands to be sold for payment of his debts, with a power of revocation by any writing under hand and seal; a fine was levied accordingly on the first day of *February*, 24. *Eliz.*; he covenanted with other trustees to levy another fine of the same land to the use of himself in tail with divers remainders over, which fine was also levied; the question in that case was, Whether this latter deed, by which he covenanted to levy a fine to other uses, was a revocation of the former? it was argued, that the deed alone could not do it, because in operation of

(a) 1. Vent. 278. Raym. 239. 2. Lev. 149.—See Powell on Powers, 68.

law it was suspended till the fine was levied; and it was but an executory intention till that time; because he might have altered his mind, and not levied the fine pursuant to his covenant: besides, it was no express revocation, and the rule is, that such powers which go to divest an estate must be strictly pursued (a): neither could the fine alone without the deed be a good execution of the power, because it was not pursuant to the deed of the twenty-first of *Queen Elizabeth*, for he having reserved a power to revoke by any writing under his hand and seal, a fine cannot be called such a writing, for it is a record: but it was adjudged upon the whole matter a good revocation; for though these were several instruments made at several times, yet they were but as one conveyance; and though it is not revoked by the fine itself, yet the covenant * to levy that fine works a revocation, which covenant is made perfect when the fine is actually levied. So here, when this fine was levied, though at a different time from that fine mentioned in the deed of the twenty-ninth of *January*, yet they both make but one conveyance, and the one adds strength to the other. But there was a judgment which comes nearer to the case at bar, both in reason and consequence, and it was thus (b): One *Parker*, by deed dated the thirty-first of *October* in the eighth year of *James the First*, granted a rent-charge in fee to *Warden*, in which deed there was a covenant to levy a fine to these uses, viz. that if the rent should be in arrear at the days limited in the deed for the payment thereof, and no distress to be taken upon the land, or if taken and replevied, that then the grantee and his heirs might enter, &c. *Warden*, by bargain and sale enrolled and dated the twelfth day of *June* in the first year of *James the First*, conveys his interest to *Fisher*, and afterwards half a year's rent was in arrear, viz. in *October* in the eleventh year of *James the First*; in *Trinity Term*, in the twelfth year of *James the First*, a fine was levied to the uses of the first deed dated the thirty-first day of *October*, and *Fisher* distrained for rent in *September* following; two Justices, viz. COKE and MONTAGUE, held, that notwithstanding this rent was in arrear before the fine levied, yet that being once done made but one assurance, and the uses thereof were well guided by the first indenture: their reason was, that though these were distinct acts, and done at several times, yet in construction of law they shall be taken as one, because the first deed was executory only till the fine was levied, and must then of necessity have relation to the original cause: it is true, HOUGHTON and DODDERIDGE, Justices, held, that no uses were raised till the fine was actually levied, which was not done till after the rent was due, and therefore such uses which were raised afterwards could not extend to the rent arrear before that time; but the other opinion seems to be better warranted by the books and authorities in law. To apply it therefore to the present case, viz. the first deed dated the twenty-ninth of *January* was

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Ld. Ray. 793.
908. 1198.

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(a) See the case of *Lutwich v. Piggot*, 3. Mod. 269. and the cases there cited.
(b) 1. Roll. Abr. 349.

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only *executory* till the fine was actually levied ; it waited on and attended that time ; it was the first and only cause why the fine was afterwards levied, which being once done must look back and have respect to the original cause. * Neither is there any variance between these two acts, for the deed recites that a fine is already acknowledged, which by common intendment must be taken to be the caption thereof before the Term in which the deed is dated, otherwise it is not sense to say afterwards, *viz.* "and " agreed to be levied the then next *Hilary Term*;" for how can a fine be said to be already acknowledged, and agreed to be levied a year afterwards ? But supposing the fine was to be levied a year after the date of the deed, yet if it be levied before, it is still in pursuance of the original intention of the parties, and being of the same lands, it cannot, with any colour of reason, be intended to be different from what was at first designed by the deed of the twenty-ninth of *January*, and therefore no parol-averment ought to be admitted against it.

SECONDLY, Authorities are not wanting in THE BOOKS to prove that the uses may be well directed by the first deed of the twenty-ninth of *January*, *viz.* A husband and wife by deed covenanted to levy a fine of lands (a) to *Worfield*, "upon condition that if " they or either of them pay 943l. to *Worfield* at *Lady-day* 1611, " that then his estate should cease;" in which deed the husband covenanted that he and his heirs should enjoy the lands under that condition of payment, &c. and after default the rents to be received by *Worfield* and his heirs, without interruption, &c. Six months afterwards there was a subsequent deed made between the same parties and of the same lands under the same condition of payment as in the first deed, and the husband covenanted that he and his wife would make a further assurance by fine to *Worfield* and his heirs, under the same condition, until default of payment, &c. and after default, to the use of *Worfield* and his heirs absolutely ; which is different from the uses declared by the first deed, for those were, that *Worfield* and his heirs should receive the rent if default should be in payment, &c. In *Easter Term* following, a fine was levied by the husband and wife to *Worfield* and his heirs ; and it was adjudged that the uses should be directed by the first indenture (b).

THIRDLY, The uses being well limited by the first deed, were not revoked or altered by the subsequent deed of the thirty-first of *January*, because it has no reference to any fine levied ; it limits no uses to any person whatsoever ; it is only a personal agreement and a covenant between husband and wife ; it is not made between the same parties ; neither hath it any relation to the former deed. * Now if this intermediate act between the first deed and the fine levied should be a revocation of the former uses, no man can be

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(a) *Webb v. Worfield*, Bridg. 112. that the wife disagreed to the last deed.
(b) But it was because the jury found — NOTE to former Edition.

safe in lending money; there would be an easy way opened to base creditors, and to defraud them of their just debts, if the first deed and fine will not give them a title. But the husband cannot covenant with the wife, nor she with him, they are but as one person in law; and therefore as this latter deed stands by itself, it is nothing, it is void both in law and reason, because there is but one party to it. It is true, if it had any relation to a fine, it might amount to a declaration of its uses, but there is neither mention of any fine or former deed; therefore if it should be a revocation, it is only *quousque* the husband settle a jointure, &c.; but it will not amount to that, because if it be a covenant it is void, for a wife during coverture cannot bind her freehold but by fine, where she is examined and barred by estoppel. And it is for this reason that the *Countess of Rutland's Case* (a) cannot be applied to this, where it was held, that the last indenture shall direct the uses of a subsequent fine, which was shortly thus, *viz.* The *Earl of Rutland*, by deed dated the tenth of *March*, did covenant with *B.* and *G.* to assure the manor of *E.* to them before the end of the next *Trinity Term* by fine, &c. to the use of the said earl and his lady, and the heirs of the earl; on the twenty-eighth day of the same *March* he made another deed to the said *B.* and *G.* by which he covenanted to convey the said manor to them before *Lady-day* then next following, to the use of the said earl, and the heirs males of his body, remainder over, &c. by which last deed the earl did covenant with his said trustees, that if he should not sufficiently convey, &c. before the said *Lady-day*, that then he and his heirs would stand seised thereof to the uses contained in the second deed; on the seventeenth of *September* following, and not before, the fine was levied, and it was adjudged, that the uses thereof were guided by the last deed; but the reason was, because it was a good conveyance at law, it being a covenant to stand seised to such uses; which differs from the case at bar, because the latter deed was made between husband and wife only, and therefore void. Here is no alteration of the minds of the parties as to the uses before declared, nor any express or implied revocation; the latter deed is no more than a contract, and that was never yet allowed to make a revocation; for suppose * the husband and wife had covenanted between themselves to sell the land, it would not have been a revocation of the uses. This contract is as much void as any agreement can be which is made by a *feme covert*, who cannot be bound by any act which she does to her prejudice; and for this reason it is that she should not take advantage of any act which she can do for her own benefit. Since therefore this latter deed of the thirty-first of *January* does not refer to the fine, since it is only a personal contract, and cannot therefore amount to a revocation, and since it is void in law, it being no legal conveyance either to affect the estate, or bind

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(a) *Rutland v. Rutland*, 5. Co. 25. 2. Ander. 196. Moor, 723. Cro. Jac. 29.

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the person of the woman, therefore the uses declared by the first deed must stand unaltered and not revoked,

CURIA. The second deed is not only evidence, but it actually changes the uses of the first deed; for before the statute of Frauds 29. Car. 2. c. 3. any thing, even a *parol-declaration* of the uses of a fine, was good. Now supposing this to be a *deed-poll*, yet it will have the same operation as a *deed indented*, for they both work by way of *estoppel*.

And therefore in *Hilary Term*, in the ninth year of *William the Third*, judgment was given for the plaintiff, which was afterwards removed by WRIT OF ERROR into the house of peers, and there, the judgment was affirmed,

* [270]

Case 104.

The King and Queen against Larwood.

INFORMATION against the defendant, setting forth, that the City of Norwich is an ancient city incorporated, whose liberties were confirmed in the fifth year of *Henry the Fourth*, which king made it a county, and gave the inhabitants thereof power to chuse two *sheriffs* every year; that on the twenty-sixth of *January*, in the fifteenth year of *Charles the Second*, the charter granted to that city by *Henry the Fourth* was confirmed, by which it was appointed, that one *sheriff* thereof shall be chosen by the mayor sheriffs and aldermen, and the other *sheriff* by the mayor and commonalty of the said city, and that they shall be sworn every year upon the twenty-ninth day of *September*, in the GUILDHALL of the said city, before the mayor and two or more justices of the peace; * that the defendant on the ninth of *July*, in the fourth year of *William the Third*, was by the mayor sheriffs and aldermen, &c. duly chosen *sheriff* of the said city *juxta formam chartæ* of *Charles the Second*; and they aver him to be a person capable of the office; and that he had due notice that he was chosen, &c. and was required to take the oath of a *sheriff* on the twenty-ninth of *September* following, but that he refused so to do, and to take upon him the said office of *sheriff*, to the great hindrance of the business both of the king and his subjects, &c.

- S. C. 1. Salk. 168. The defendant pleaded the statute of 13. Car. 2. c. 1. commonly called THE CORPORATION ACT, by which it is enacted,
S. C. 3. Salk. 774. " That no person shall be elected or chosen into any office of
S. C. Skin. 574. " trust in cities, corporations, or boroughs, who shall not within
S. C. Carth. 306. " one year next before such election have taken the sacrament of
S. C. Holt. 505. " the Lord's Supper according to the rites of the church of Eng-
S. C. Comb. 315. " land, and in default thereof such election is declared void."
S. C. 2. Vent. 248. Then he averred, that for several years last past he was A PRO-
S. C. 11. Mod. 67. TESTANT DISSENTER, and did not take the sacrament within a
S. C. 1. Ld. Ray. 29. year before he was chosen *sheriff*, &c. so that the choice was void;
6. Com. Dg. " Viscount" (A. 2.). 4. Bac. Abr. 125. 167. 431. Stra. 1193. Ld. Ray. 1354. that

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that on the nineteenth of *July*, in the first year of *William and Mary*, he did take the oaths appointed by the statute of 1. *Will. & Mary*, c. 1. entitled, "An Act for removing and preventing all disputes concerning the sitting of that parliament," and subscribed the declaration appointed by the statute of 30. *Car. 2. c. 1.* entitled, "An Act for disabling Papists to sit in either House of Parliament, &c."

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They reply, that he, as a member of the church of *England*, ought to have taken the sacrament within a year before the election, and that he ought not to be excused from taking upon him the office by his own default, &c.

The defendant rejoined, that he ought not, as a member of the church of *England*, to have taken the sacrament every year according to the rites of the church, &c. for that by an act made 1. *Will. & Mary* for exempting PROTESTANT DISSENTERS from the church of *England* from the penalties of certain laws therein named, it is enacted, "that no law or statute of this realm made against Popish recusants, excepting the statutes of 25. *Car. 2. c. 2.* and 30. *Car. 2. c. 1.* for disabling papists, &c. shall be construed to extend to dissenters from the church of *England* who shall take the oaths prescribed by the statute of 1. *Will. & Mary*, c. 1. and subscribe the declaration enjoined by 30. *Car. 2. c. 1.*" which oaths and declaration the justices of peace in * their quarter sessions are obliged to tender to the person: by which statute of 1. *Will. & Mary* it is farther enacted, "that such persons who shall take the said oaths, and subscribe the said declaration, shall not be liable to any penalties, &c. mentioned in the statute of 35. *Eliz. c. 1.* nor 22. *Car. 2. c. 1.* entitled, "An Act to prevent seditious Conventicles;" nor should be prosecuted in any court for nonconformity to the church of *England*, &c." Then he averred that he was A PROTESTANT DISSENTER on the nineteenth of *July*, 1. *Will. & Mary*, and that at the quarter sessions of the peace then held at *Norwich*, he took the said oaths, and subscribed the declaration, &c.

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The plaintiff demurred generally.

FOR THE PLAINTIFF. The intent of the statute of 13. *Car. 2. c. 1.* was not to keep men out of the church, but to incapacitate such who would not conform, that they might not hold any office till they came into the church; for otherwise it would be to give a man opportunity by his wilful default to avoid an office of burthen when it is coming upon him; and so it was adjudged in *Sir John Read's Case (a)*, who was excommunicated for not paying *alimony*, and because he would not take off the excommunication when he was appointed sheriff of the county, he was fined fifteen hundred pounds. It is true, this statute says, "that if the

(a) 1. *Freem. 327.*

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30. Mod. 180.

Ld. Ray. 500.

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" person elected shall not, within a year before his election, receive the sacrament, it shall be void;" but, as to that, the statute must have a reasonable exposition, *viz.* it shall be void to claim any benefit to the office to which he is elected, but not so void that he shall not be punished for not qualifying of himself; it is like the cases of bishops, deans, and chapters, whose leases, if not pursuant to the statute, will be adjudged void; but it has often been ruled, that they are not void to all intents, but only to the lessors themselves, and against their successors; for statutes must have a reasonable construction (*a*). Every man is enjoined by the ecclesiastical law to take the sacrament once in a year, and that is part of the law of the land; but, to excuse himself, the defendant says, that there is another law made 1. *Will. & Mary* to exempt persons from being punished for non-conformity, which is a very unnecessary excuse, because a punishment is not now intended for any thing exempted by the statute, but for an offence at the common law in not qualifying himself * to take the office of a sheriff for the service of the government, and which by law he ought to take upon him.

Then as to the pleading, this rejoinder is a *departure* from the bar; for he has pleaded the statute of 13. *Car.* 2. which (as he alleges) made his election void by not receiving the sacrament within a year; and in his rejoinder he excuses himself from taking the office by pleading another statute, *viz.* that he ought not to take the sacrament according to the rites of the church, &c. as a member thereof, &c. which is not pursuant to the same thing.

ROTHERAM, *Serjeant, contra.* If the election is made by the statute of 13. *Car.* 2. c. 1. then the defendant was never lawfully chosen sheriff, and so cannot be punished; and it would be very inconvenient if he should be compelled to act without a legal election, because he would be incapable of executing any process. The statute intended only to disable men who were not of the communion of the church of *England* to hold public offices, and not to punish them if they did not qualify themselves; it was made in favour of the church, and not to inflict punishments upon dissenters for non-conformity; for they being excluded (unless they would qualify themselves), the profits of all the great and beneficial places throughout the kingdom must of consequence be enjoyed by churchmen. That this was the intent and design of that law will more plainly appear by comparing the *Bartholomew* and *Oxford* acts together (*b*): the one enjoins, " That every parson, &c. (shall, within a time limited, declare his assent to the Book of Common Prayer, or that his living shall be *ipso facto* void:" the other enacts, " That if they have not declared their assent as aforesaid, and shall take upon them to preach, that then they shall not come within five miles of a corporation, or the parish where he was parson, upon penalty of forty pounds;" which shews, that the first act makes the living only void, but the other inflicts

(a) Plowd. 110. b. 3. Co. 118. a. (b) 14. *Car.* 2. c. 4. and 17. *Car.* 2. c. 2. the.

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the punishment; therefore the defendant cannot be punished in this case, because the statute of 30. *Car. 2. c. 2.* makes the election void, but adds no punishment to the person unqualified. As to the objection, that the incapacity arises from the default of the defendant himself, that cannot be material; for if he remove from the corporation he shall not be punished for not executing the office, and yet he is thereby made incapable by his own act. * The neglect in not receiving the sacrament is not an offence at the common law, or against any statute; it is made so by THE CANONS, which enjoin the receiving of it three times in a year; so that it does not fall within the cognizance of the temporal courts to punish the defendant but by that law against which the offence was committed. But if the court of king's bench should take notice of it, he ought not to be made a criminal upon a bare presumption, for he may be hindered from the receiving of it by an incapacity of mind, by sickness, or otherwise. Neither can *Sir John Read's Case* be any authority against the now defendant, because he was lawfully appointed to be sheriff, and his incapacity incurred *ex post facto*, which is different from this case. But if the neglect to receive the sacrament were an offence before the statute of 1. *Will. & Mary, c. 18.* yet it is not punishable now; for by that statute PROTESTANT DISSENTERS are exempted from the punishment inflicted on them as such by any former laws; and though they dissent from the lawful and established church, yet if they are protestants, and have taken THE OATHS, and subscribed THE DECLARATION, they are not to be punished for non-conformity; and the defendant has averred himself in his plea to be qualified in these points, and so not to be prosecuted for non-conformity.

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Afterwards, in *Hilary Term 6. & 7. William and Mary*, judgment was given for the plaintiff, viz. that THE CORPORATION ACT never designed to exempt DISSENTERS from bearing offices in the government, but to establish a succession of persons who were well affected to it, for otherwise it would be an encouragement for some men to persist in their non-conformity on purpose to avoid offices of burthen and charge, instead of bringing them to conform, which was chiefly intended by that statute. It is a fault in the defendant not to have received the sacrament at least once in a year, because by the canon law, which has been received here time out of mind, he is obliged so to do; and therefore it is very absurd to alledge as an excuse what is really a neglect of his duty. If he had been disabled by a judgment in law, he might have been excused; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the government.

Salk. 168.
4- Bac. Abr.

432.

* But in case of an *excommunication*, where he may remove the disability, there he shall not be excused.

* [274]

Then as to the pleading, he does not say that he could not receive the sacrament, &c. for *the sake of his conscience*. Supposing then a man before the act of indulgence of 1. *Will. & Mary* had neglected or omitted to receive the same within a year before his election

election

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election to an office, no man will say that it should have excused him. The defendant therefore should at first have pleaded in bar, that he was A DISSENTER from the church, &c. and then brought himself within the compass of the act of indulgence, of which the court cannot take any notice, because it is a *private act* (a); for before it was made, the law did not take any notice of PROTESTANT DISSENTERS, but only of dissenters from the church in general: besides, it is an act which does not extend to all sorts of PROTESTANT DISSENTERS, but only to such who shall qualify themselves as therein is prescribed. If, therefore, THE TOLERATION ACT be a private law, then THE CORPORATION ACT will not be a sufficient excuse for the defendant to be exempted from this office, because the act never intended to excuse him who was liable before; it was not made in favour of dissenters; it intended to make persons qualify themselves the better to serve the government in establishing faithful officers therein; and ever since the making of that law, when a freeman who was a dissenter was chosen an alderman of a corporation, he never insisted upon the act as an excuse, but submitted to a fine; and so must the defendant.

But ONE JUDGE (and THE LORD KEEPER, as it was said at bar) being of a contrary opinion, *viz.* that the defendant was sufficiently punished by THE CORPORATION ACT, in being disabled to hold any office or employment of profit; and now to punish him by an *information* would be a double punishment for one offence, which the law will not allow; therefore there being a *capias* against the defendant *pro fine*, and he now appearing in court, he was fined five marks, and no more (b).

(a) It is now declared to be a *public act* by 19. Geo. 3. c. 44.

(b) See the case of *Harrison v. Evans*, 2. Burn's E. L. 168. Cowp. 393. 535. — In 1748 the corporation of London, by a bye-law, imposed a fine of six hundred pounds upon every person who, being elected, should refuse to serve the office of sheriff. — The plaintiff levied debt in the sheriff's court against the defendant for this penalty. The defendant pleaded the 13. Car. 2. averring, that he was a *Protestant dissenter*, within the Toleration Act, 1. & 2. Will. & Mary, c. 18. of scrupulous conscience, and therefore had not received the sacrament. The plaintiff replied the 5. Geo. 1. c. 6. which confirms members of corporations in their respective offices, although they have not received the sacrament according to the directions of the 13. Car. 2. To this replication the defendant de-

murred, and judgment was given upon it in favour of the city. The defendant appealed to the court of hustings, where the judgment was affirmed. A special commission of errors was sued out by the defendant, directed to Willes, Parker, Foster, Bathurst, and Wilmot; and, after great argument and deliberation, the judgment of the sheriff's court, and the affirmance by the court of hustings, were unanimously reversed. The plaintiff brought a writ of error in parliament; and on the 4th February 1767, Lord Mansfield, with five other Judges, against Perrot, were of opinion, that, upon the facts admitted by the pleadings in this cause, the defendant Evans should be allowed to object to the validity of his election to the office of sheriff in bar to the present action, by reason that he had not taken the sacrament within the time limited.

The

* The King and Queen against Kemp.

Case 105.

Michaelmas Term, 5. Will. & Mary, Roll 333.

SCIRE FACIAS out of the petty-bag to repeal letters patents, &c. setting forth, that *King Charles the Second* did, on the twenty-fifth of *July*, in the twelfth year of his reign, grant to *Martin* the office of searcher in the port of *Plymouth*, *quandiu domino regi placuerit*; that on the fourteenth of *January*, in the twenty-fifth year of his reign, the king, by letters patents reciting the grant to *Martin*, &c. did grant this office to *William Fryer* for life, *habendum cum post mortem sursumrestitutionem vel forisfacturam* of the said *Martin*, it should be void, with a *non obstante* to the statute of 14. *Rich. 2. c. 10.* *William Fryer*, on the twenty-fourth of *December*, in the twenty-seventh year of *Charles the Second*, surrendered his interest to the king, who, in consideration thereof, the same day, granted this office to *Henry Kemp* for life, to commence upon the death, surrender, forfeiture, or other sooner determination whatsoever, of the estate of *Martin*, and, in the same letters patents, grants it to *William Kemp* for life, upon the death, surrender, or forfeiture of *Henry Kemp* and *Martin*. *Henry Kemp* died, *Martin* still surviving; then the king died; so that *Martin's* patent was void; for he having only an estate at will insisted, that it was not only determined by the grant made to *Fryer*, but by the demise of the king; and *William Kemp* being possessed of the office by virtue of the last grant, a *scire facias* was brought to repeal it, to which he demurred.

The questions were,

FIRST, Whether the grant made to *William Fryer* was good, or not? for if that fail, then the grant to *Kemp* is void.

SECONDLY, Whether the king can grant an office to commence in futuro?

The grant to *William Fryer* is void, because the estate of *Martin* being only "during pleasure," it was too weak to support a grant of this office in reversion, which was likewise to * commence upon such an uncertainty as the determination of the king's will. Besides, the king was mistaken in his grant, both in point of law and in fact.

FIRST in point of fact, because he intended to grant an estate in reversion to *Fryer*: now *Martin* having an estate at will, if that will be determined by the grant itself to *Fryer*, then the king had the office in possession, and *Fryer* must have it so, which was never intended. It is plain that the king thought that *Martin* had a more durable estate when he made the grant to *Fryer*, for *Martin's* patent is recited in *Fryer's* grant, which patent was then actually determined. Now where an office, or an interest in an office, is recited to be in being, when in truth it is not so at the time

A grant from the crown of the office of port searcher to A. for life, to commence after the death, surrender, or forfeiture of B. a prior grantee of the said office during the king's pleasure, is good; for the office is only ministerial.

S. C. 2. Salk. 465.
S. C. Comb. 334.
S. C. Skin. 446. 580.
S. C. Carth. 350.
S. C. 12. Mod. 77.
S. C. Holt, 419.
S. C. 1. Ld. Ray. 49.
4. Co. 4.
2. Roll. Abr. 154.
Co. Lit. 3. 5.
Hob. 203.
Dyer, 80. 94.
3. Dan. 161.
Fitzg. 90. 290.
Stra. 43.
2. Will. 166.
2. Bl. Com. 165. 314.
3. Bac. Abr. 725.
4. Bac. Abr. 206. 211. 296.

* [276]

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time of the grant, it is enough to make that grant void (a). King Henry the Seventh, in the ninth year of his reign, by letters patents made Robert Blague remembrancer of THE EXCHEQUER for life, who, in the third year of Henry the Eighth, was made one of the barons of the exchequer *quandiu se bene gesserit*; he still executed his first office by deputy; and afterwards, in the seventh year of Henry the Eighth, he got leave of the king to grant it to his son for life, when it should be void by his death or surrender, or by any other means whatsoever; but because he had no right to the office after he was baron, therefore it was held, that the grant to the son was void, and a *scire facias* being brought by the king it was repealed (b). It is observable, that the king does not say, *ex certâ scientiâ et mero motu damus*, &c. Now suppose he had died before Martin, as in fact he did, that would certainly have determined his interest; but yet the patent says, that Fryer's interest shall not commence but upon the death, surrender, or forfeiture of Martin. Sir Thomas Moor being possessed of a term for forty-four years was attainted of treason; the king seized it, and made a grant thereof to Philips, HABENDUM for twenty-one years after the end of the term made to Sir Thomas: now this lease to Philips was adjudged void (c), because the first lease for forty-four years being forfeited by attainder, was extinguished in the king long before that lease was made; so that the estate and interest to Philips was not well limited in the commencement, which seems to come near the case at bar; for by the grant to Fryer his interest was to commence upon the death, &c. of Martin, when it actually commenced in possession, because Martin had only an estate at will, which was determined by that very grant made to Fryer.

* [277] SECONDLY, * The king was mistaken in the law; for by the premises in his grant his will (as to Martin's interest) being determined, the HABENDUM to Fryer after the death of Martin can have no operation, because its office is to limit, and not to revive, or extinguish. And the *non obstante* to the statute of Richard the Second (d) will not help, because the grant to Fryer is void. It is true, the first grant is recited in the second, for otherwise it had been clearly void by the express words of the statute of 6. Hen. 8. c. 15. which law was made on purpose that the king might not be deceived in his grants (e); but this recital of the first grant must be intended at the suggestion of the party, and he having falsely informed the king, viz. that the grant to Martin was in being when the king had determined his will, that false information, being the consideration upon which the second letters patents were grounded, shall avoid the grant (f). If, therefore, the grant to Fryer was void in its creation, then his surrender to the king must be likewise void; and if any thing passed by

(a) 2. Brownl. 241.

(b) Dyer, 197. b.

(c) 3. Leon. 5. 1. And. 6.

(d) 14. Ricb. 2. c. 10.

(e) Dyer, 337. 339.

(f) 6. Co. 55. b. Cro. Car. 197.
Carth. 350. 4. Bac. Abr. 211.

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the second grant to *Kemp*, it must be an estate in possession, and must vest presently, which was never intended; it cannot be an estate for life in him to vest *in futuro*, for the law will not allow any fractions of an estate for life. And to prove that at the time of the second grant the king had the office in possession, the case of one *Philpot* was cited, which was mentioned by *FLEMING*, *Chief Justice*, in the second year of *Queen Elizabeth*, in his argument in my *Lord Rutland's Case* (a), viz. The king made a lease for years, and afterwards, reciting that lease, granted the reversion to another, but before the letters patents were sealed the lessee surrendered the term; and it was held, that by this means the grant of the reversion was void, because the king intended to pass a reversion who had the possession himself at the time of the grant; so that when his grants cannot have the operation which is intended by him, they must be void.

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E contra. Nothing has been said why the grant to *Fryer* should be void, but that by the making of the patent to him the king had determined his will as to *Martin*; so that at that time he had an estate in possession, which he granted as a reversion, and therefore his grant was void. But it appears to be otherwise upon reading the letters patents, for the king has therein recited the estate at will to *Martin*, which shews that he did not intend to determine it. * It has been objected, that *Fryer's* patent is void, because the limitation of his interest is different from what was intended by the king, for it was to commence upon the "death, forfeiture, or surrender of *Martin*." Now though in fact it did not commence by either of these means, but by the death of the king, yet this cannot be an objection of any weight, because these words were only to shew when his title shall begin, and if the king be mistaken in that matter it is not to his prejudice; and therefore his grant cannot be void for this wrong commencement, or for the uncertainty when it should commence. It is true, it might have been made much better, but still it is a good grant, and that within the reason of the *Bishop of Bath's Case* (b), which was thus: He made a lease to *Elizabeth* and *Robert Cofin* for sixty years, in which there was a *PROVISO*, that if they died within the term the bishop and his successors might re-enter; *Robert* survived *Elizabeth*; then the bishop died; and in the eighteenth year of *Henry the Eighth* another was consecrated, who made a lease of the same land "to *Clark* for sixty years, when it should be void after the "death, forfeiture, or surrender of *Robert Cofin*," who died within the term first granted; it was objected in that case, that the commencement of the second lease was uncertain, for it must be upon one of those three accidents, and therefore it was void, because uncertain upon which of those contingencies it should commence; for if it did not begin upon *forfeiture* or *surrender*, it could never begin in possession upon the death of *Robert Cofin*, because the first lease was not void upon his death; for it was

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(a) 2. Brownl. 241.

(b) 6. Co. 35.

voidable

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voidable by re-entry of the bishop ; but it was adjudged, that the second lease did vest in point of interest immediately, and should not wait to take effect in possession at the end of the term first demised, if that lease should not happen to determine by either of those three accidents ; so that its commencement in interest was certain enough : in which case it was also agreed (a), that if it be doubtful whether the king have a title to grant or not, by reason of a former lease in being which may be either good or not, and the second lessee accepts a lease of the same lands, " HABENDUM after " the end or determination of the former lease, and if that lease " should not happen to be good, then from such a Feast for so many " years, &c. ;" now though the commencement of such a lease as this seems to be very uncertain, yet it is good in the case of the king, because the first lease must be void, or not ; if void, then the second * lease commences from the Feast, &c. ; if good, then from the determination of the first lease. A grant of a stewardship of several manors by name, without mentioning in what county, is very uncertain, because the king may have divers manors of the same name in several counties, and no issue can be taken which manors the king intended to grant ; but yet such a patent has been held good (b). So a grant to the Earl of Rutland " à tempore " *plenæ ætatis*," when in truth he was of age long before, yet it was adjudged a good patent (c), because it was the intent of the king that it should commence from that time ; and if that could not be, then for the time to come.

But the most material question was not debated by those who argued on the other side, *viz.* Whether an estate for life in an office may be granted *in futuro*, to commence after the determination of an estate at will ? for if this can be done, though it is a grant in reversion, there needs no precedent estate to support it.

Ld. Ray. 49.
853.

As to this matter, the king has a general power to grant offices in reversion : it has been a doubtful point whether a ministerial office could be so granted in the case of a common person ; but it was never questioned but the king might do it, who has a special prerogative for that very purpose ; and therefore, in the fifteenth year of *Queen Elizabeth*, it was the opinion of my LORD DYER (d), who was a learned Judge, that a bishop could not grant the office of a register in reversion without prescribing so to do, because in propriety of speech there is no reversion of this office, it is only a nomination of the person who shall succeed the officer in possession ; but the king may grant it after the life of the person in being, though not by way of reversion, but only reciting, that such a one has an estate for life, "*nos de gratiâ speciali, &c. concessimus officium, &c.*" to the grantee, *habendum post mortem, &c.* (e). But as to this matter the law is now altered, *viz.* that a bishop may grant the office of register in reversion without reciting the

(a) 6. Co. 36. a.
(b) 9. Co. 42. 4. Bac. Abr. 214.
(c) 8. Co. 45.
(d) Dyer, 80. 259.
(e) See the Year Books 9. Edw. 4

pl. 6. and the last case in 3. Hen. 7.
Bro. title " Patent," pl. 52. 3. Leon.
31. Hob. 150. Cro. Car. 279.
2. Roll. Abr. 154. 3. Bac. Abr. 735.

estate

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estate of the first grantee ; and if so, certainly the king may grant this office *in futuro* ; and the rather, because in its very nature he has only a right of nomination, and the grantee himself has little more in it than a bare *authority* without an *interest* ; he has only a power to search for prohibited goods, either imported or exported, at *Plymouth* ; and it was never yet denied, but an *authority* (as this is) might be granted *in futuro* (a). * It is no objection to say, that a freehold in lands, &c. cannot be thus granted. It is true, the law is so in the case of a freehold of lands, which are always in being, for otherwise it would be *in abeyance*, which is not allowed but in particular cases ; and it would be to make fractions of estates ; neither could *livery of seisin* be had in such cases ; but none of these reasons concern an office which has no existence but at the pleasure of the grantor, and is no longer in being than whilst it continues in grant. But the wisdom of the law has made a difference even in offices themselves, *viz.* between such as are in fee existing, and such as are only granted for life or at will ; and then offices in fee will fall under the same rules with other inheritances ; but offices for life may be granted *in futuro* by the same reason as a rent or a common may be granted to a man and his heirs ; and therefore in this grant the king was neither mistaken in fact or in law ; for this office may be granted *in futuro* after the determination of an estate at will, which is not to support the subsequent grant, but the recital of it is only to shew when that shall take place.

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CURIA. The king may grant an estate in an office to commence *in futuro*, or upon a contingency, which estate shall arise out of the inheritance he has in the office itself ; for such he may have in point of interest, though not in execution. Now admitting that the estate at will which *Martin* had was determined, yet the grant to *Fryer* shall be good, and by consequence after his surrender the grant to *Kemp* shall be also good ; for there was such an office as this of *searcher*, &c. though no estate in the office was in being when the grant was made to *Fryer* ; and if so, then by that grant a new thing was created, to commence *in futuro* after the death, &c. of *Martin* ; and since *Corbet's Case* (b), it has not been doubted but a rent *de novo* may be granted to commence *in futuro* (c), for it is a creature of the grantor ; and this being in the king's case, he may constitute his grant in what manner he thinks fit. There have been many such grants of late years ; and it will be very hard to assign a reason why a grant to commence *in futuro* should not be as good where there is no such estate or interest in an office in being. This is not a remainder or reversion ; it is not the one, because not created when the particular estate was granted ; * nor the other, because there is no inheritance in this office ; but still it is a good grant by way of reversion, *viz.* HABENDUM after the death of the first grantee, &c. and such grants have been held good in law.

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Wherefore, in *Trinity Term* following, judgment was given for the defendant.

(a) March, 38. 3. Leon. 32. Ld. Ray. 49. 51. 853.

(b) 1. Co. 77.

(c) Dyer, 311. a. 1. Sid. 285. 1. Mod. 30. Salk. 577. 4. Com. Dig. " Estates" (B. 13.).

Cafe 106.

Knipe against Edwin.

If the high steward of Westminster name one person to be bailiff, and the dean and chapter name another, the Court will grant a MANDAMUS to the appointee of the high steward; but without prejudice to the dean and chapter.

S. C. Comb.

244.

Ante, 31. 52.

Carth. 217.

11. Co. 98.

Stiles, 452.

1. Vint. 143.

3. Bac. Abr.

350, 351.

Ld. Ray. 159.

338.

10. Mod. 146.

12. Mod. 609.

A MANDAMUS to the dean and chapter of Westminster to admit the defendant to the office of bailiff there, upon the nomination of the Duke of Ormond, who was high steward.

And it was insisted, that he could not have an *affize*, because he had neither any *seisin* or *freehold* before admittance.

E contra. It is the dean and chapter, and not the high steward, who usually appoint a person to this office; for of common right they who have a franchise or *retorna brevium* have also power to put in a bailiff, which the dean and chapter have in this case, and accordingly they have always granted this office; and when the person is in, he is stiled *ballivus decani et capituli. &c.*; and it is they who are to answer for his miscarriages. A MANDAMUS is a *prerogative writ*, and usually granted where the public justice of the nation is concerned; but here is a dispute between two persons about the right of nomination to this office, and Knipe is admitted by the dean and chapter, and sworn into it, so that he has a freehold for life; and this writ was never yet granted to try titles: if Edwin has any prejudice, he may bring an action on the case, as a clerk may against an archdeacon who refuses to admit him, but cannot have a *mandamus* (a).

CURIA. An action on the case will not put the man in possession of the office, for by that he shall only recover damages.

A *mandamus* was granted; but without prejudice.

(a) But see March, 101.

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Cafe 107.

* Reeve against Long.

If a devise be made to A. for life, with remainder, after his decease, to the first son of the said A. and the heirs male of such first son; and for default of such issue, to the second and every other son of the body of the said A. successively, &c.; and A. dies seized of the estate for life, leaving his wife *enfeint* with a son;

ERROR OF A JUDGMENT in the common pleas in ejectment for lands in Melksham, in the county of Wilts, in which there was a special verdict found to this effect:

John Long, Esq. was seized of the lands, &c. in fee, and by his last will, dated the 20th of July 1676, devised the same to his nephew Henry Long (the eldest son of his brother Richard Long) for life, and after his decease to the first son of the said Henry Long lawfully begotten, and the heirs males of the body of such first son lawfully issuing; and for default of such issue, to the second, third, fourth, fifth, &c. and every other son of the body of the said Henry Long lawfully to be begotten, successively one after another, and to the heirs males of their respective bodies; and for default of such issue, to Richard Long the defendant, second son of Richard Long, for life; and after his decease, to his first, second, third, &c. and every other son, *ut supra*, with divers remainders over. John Long died, and Henry entered, who had issue one daughter; and about Lady-

Day 1687 he died, leaving his wife *enfeint* with a son, who was born this son, on his being born, shall take the remainder.—S. C. 3. Lev. 408. S. C. Salk. 227. S. C. Skin. 430. S. C. Comb. 252. S. C. Carth. 309. S. C. 12. Mod. 53. S. C. Holt, 328. S. C. 2. Eq. Abr. 336. Ante, 259. 1. Co. 95. Cro. Car. 412. 3. Leon. 2. 3. Com. Dig. 476. 3. Com. Dig. "Discent" (C. 2.). 4. Com. Dig. "Estates" (B. 13.). 2. Bac. Abr. 50. 4. Bac. Abr. 312.

about

about six months after the death of his father. But upon the death of *Henry* without issue male, *Richard Long*, being the next in remainder, entered, &c. and afterwards the *posthumous son*, by his guardian, entered upon him; and thereupon *Richard* brought this ejectment, and had judgment in the common pleas.

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The judgment was said to be erroneous.

It is plain that *Henry* the after-born son is heir at law, and if this will had not been made he would have inherited; and therefore the intention of the testator must be very clear in the will itself to disinherit this heir, otherwise he must not be defeated of the estate. But his intention (which is the only considerable thing in the will) appears to be of another nature; for throughout every paragraph it is plainly to be collected, that he intended his land should go and be continued in the heirs males of his family successively. This must therefore be an *executory devise*, and not a *contingent remainder*; and the rather, because it is in the case of a will, by which estates do pass otherwise than by conveyances * at the common law; and the law will not suffer this to be construed a *contingent remainder*, because that would be to disinherit an heir upon a nicety, against the plain intention of the testator. That intentions govern in wills many authorities may be cited, viz. If a father, having three sons, devise his land to his eldest son in tail, remainder to his second son in like manner, remainder to his third son in fee, and the eldest son happen to die in the life-time of his father, leaving issue, it has been held that such issue shall inherit without a new publication of the will, because it was not the intention of the father to disinherit him (a). If, therefore, this is a *springing remainder*, the freehold vested in *Richard* till the son of *Henry* was born, and then it vested in him. And to prove it to be a *springing remainder* or *executory devise* that noted case of *Pell v. Brown* (b) was cited, which is reported in several books, viz. The father being seised in fee, and having issue three sons, *William*, *Thomas*, and *Richard*, devised it to *Thomas* and his heirs, paying *Richard* twenty pounds a-year, &c.; and if *Thomas* died without issue living *William*, then to him in fee; *Thomas* entered, and suffered a *common recovery* to the use of himself and his heirs, and devised it to *A.* and died without issue in the life-time of his brother *William*, to whom the land was adjudged; for *Thomas* had no *estate-tail*, but a *limited fee*, which was determined by his dying without issue living *William*, whose interest must arise upon a contingency; viz. by way of *executory devise*; for *Thomas* might have survived him, or might leave issue living *William*; and therefore this recovery could be no bar, because the estate of *William* did not depend upon that of *Thomas*, but was collateral to it, and a mere possibility, which a recovery could not

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- 8. Mod. 124.
- 221.
- 10. Mod. 222.
- 419. 502.
- Pre. Chan. 15.
- 67. 72. 96.
- 323.
- 1. Peer Wms.
- 20. 511.
- 2. Peer Wms.
- 28. 258. 282.
- 673.
- Cases T. T. 19.
- 44.
- Ld. Ray. 207.
- 438.

Ante, 258.
Stia. 130.

(a) *Dist. per PUGHAM, Chief Justice*, in *Fuller v. Fuller*, Cro. Eliz. 424.—But if the devise had been to a *stranger*, the will must be new published. *Notes to FORMER EDITIONS*.—And see *Plowd. Com.* 345. Cro. Eliz. 423. 2. Vern. 722. 1. Eq. Cases, 115. *Strange*, 15. 1. Peer. Wms. 397. 3. Com. Dig.

"Devise", (E. 3.). (K.). *Hodgson v. Ambrose*, Dougl. 337. and *Warner v. White*, Dougl. 344. *notes*. 1. *Brown's Cases in Chan.* 219.

(b) Cro. Jac. 590. 1. Roll. Abr. 611. 2. Roll. Rep. 394. *Palmer*, 121. *Bridgm.* 1.

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affect, and which it would have done if it had been a remainder vested. Ever since this case, executory devises have been allowed not absolutely upon a *dying without issue*, but dying so in a particular time ; for otherwise estates might be continued to perpetuity, which the policy of the law will not endure. To prove likewise that the freehold shall vest in the heir till the contingency happens, a judgment was cited in the king's bench 43. *Eliz.* (a): A man devised his lands to *M.* for a term of years, which was to commence at the next *Michaelmas* after the death of the testator, remainder to *N.* and his heirs ; * the question was, Whether this was a good remainder ? It is plain it could not take place *eo instanti* that the particular estate determined, because of the term for years coming between those estates ; but it being in the case of a devise, the freehold in the mean time shall descend to the heir of the devisor.

E contra. This is a *contingent remainder* ; for if it should be an *executory devise*, then a perpetuity would be introduced, because if it be executory in one it may be so in all the devisees ; and therefore it would be against the known principles of law to make it an *executory devise*, especially in this case, where the testator was not sure that *Henry Long* would have a son ; so that it is a plain contingency, which not happening in time, nothing remains in him to make it executory. There are two things to make a devise executory, *viz.* it must be limited upon an estate in fee-simple, and it ought to be limited upon a condition, both which are wanting in this case ; neither can any remainder be executory where there is a particular estate to support it (b). As for instance ; A devise was to his wife for life (c), and to a son after the death of his mother, if she should have a son, and if he die before he come to age, then to the right heirs of the devisor ; the devisor died without issue ; his wife married again ; then the heir of the devisor, by bargain and sale enrolled, &c. conveyed the reversion to the husband and wife, who had afterwards a son born ; and it was adjudged, that the estate limited to that son shall not enure by way of *executory devise*, because that is never allowed where a contingency is limited to depend upon a freehold capable to support it ; for the mother had a freehold for life ; and therefore it was adjudged a *contingent remainder* to the son ; and the heir at law having a reversion in fee in him by descent, it was held, that the remainder was destroyed by his conveying that reversion to the particular estate for life in the mother before her son was born. But *Archer's Case* (d) was relied on as an authority in point, *viz.* A devise to the father for life, remainder to his next heir male in tail male ; the devisor died ; the father made a feoffment with warranty ; and it was adjudged, that by this means the remainder was destroyed, because every *contingent remainder* must take place *eo instanti* that the

3. Mod. 309.
10. Mod. 362.
1. Peer Wms.
509.
Comyn. 62.
Cases T. T. 47.
237.

(a) Woodcock v. Woodcock, Cro. Eliz. 795.

(b) Raym. 164. Skin. 431. Lod-
dington v. Kime, 1. Salk. 224. Good-
right v. Cornish, 1. Salk. 226. Scat-
tergood v. Edge, 1. Salk. 229. Right
v. Hammond, Strange, 427.

(c) Purefoy v. Rogers, 2. Saund.
380. See 2. Bac. Abr. 74. 4. Bac.
Abr. 315.

(d) 1. Co. 66.

particular

particular estate determines, or vests during the particular estate.

* Now it could not take place *eo instanti* the particular estate determined; for that being gone by the feoffment, the son could not be heir to his father, who was then alive, for *nemo est hæres viventis*, and therefore could not enter for a forfeiture; neither could it vest during the particular estate, because that was actually forfeited. So here in the case at bar, the estate being limited to *Henry Long* for life, remainder to his first son, and *Henry* dying before that son was born, the remainder could not vest in him, who was not then in being; and the particular estate being determined by the death of *Henry*, it must go over to the defendant, who was next in remainder. As to the case of *Pell v. Brown*, the great labour there was to make it an estate-tail in the first devisee, which not being allowed, then it must be a void limitation to the next, unless construed to be an *executory devise* to him; and that was the reason of that judgment, on purpose that the intent of the testator might be fulfilled. But that differs from this case, because the person to whom the estate was devised was in being; but it is otherwise here.

And so the judgment in the common pleas was affirmed without any farther argument.

But in *Michaelmas Term* following it was reversed in the house of peers (a).

(a) The Judges of the court of King's bench affirmed the judgment of the common pleas, because they were unanimously of opinion, that this was a *contingent remainder*, and not an *executory devise* or a *springing remainder*; but almost all the lords, on the writ of error in parliament, were of a contrary opinion, because, being in a will, they thought, that by the meaning and equity thereof they ought not to disinherit the heir for such nicety, and therefore construed it an *executory devise* or *springing remainder* to the first and other sons, and that the freehold should vest in *Richard Long* till the son was born. All the Judges, however, were much dissatisfied with this reversal, and did not change their opinions, 4. Bac. Abr. 312. 1. Salk. 227. And therefore to take such cases out of the old law, Fearn. C. R. 236. the statute of 10. & 11. Will. 3. c. 16. was made, by which it is enacted, "That where any estate is, by marriage or other settlement, limited in remainder to or to the use of the first or other son or sons, daughter or daughters, of the body of any person lawfully begotten, with any remainder or remainders over, to or to the use of any other person, any son or sons, daughter or daughters, of such person,

"lawfully begotten, that shall be born
"after the decease of his, her, or their
"father, shall, by virtue of such settlement, take such estate so limited to
"the first and other son or sons, daughter or daughters, in the same manner
"as if born in the life-time of his, her, or their father, although there shall
"happen no estate to be limited to trustees, after the decease of the father, to
"preserve the contingent remainder of such after-born son or sons, daughter
"or daughters, until he, she, or they, come in esse, or are born, or take the same; PROVIDED, that nothing in this act shall extend to divest any estate in remainder that by virtue of any settlement is already come to the possession of any person, or to whom any right is accrued, though not in actual possession, by reason or means of any after-born son or daughter not happening to be born in the life-time of his, her, or their father."—Salkeld makes a *quære* whether this statute extends to a *devise*, the words being, "where any estate is by marriage or other settlement limited," &c. 1. Salk. 228. j but MR. JUSTICE BULLER says, "there seems no just ground for the doubt," Bull. N. P. 105.—See 1. Term Rep. 633.

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Ld. Ray. 314.
779. 355.
Gild. C. R. 131.
1. Peer Wms.
232.

To a plea of *alien enemy*, a REPLICATION THE FRENCH KING, *adversar. domini regis et dominæ reginæ de patre et matre (a) inimicis ipsorum domini regis, &c. nunc et eidem adversario suo adheren. oriundus et ingressus in regno Angliæ absque salvo conductu, &c. Et hoc paratus est verificare ubi quando, &c. et prout curia dicti domini regis et dominæ reginæ consideraverit; unde petit judicium, &c.*

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S.C. Carth. 302.
Post. 376. 405.
Carth. 265.
7. Co. 26.
Rastal, 252.
Aston, 11.
Horne, 361.
Co. Lit. 128.
12. Mod. 115.
Ld. Ray. 282.
Fitzg. 130.
12. Mod. 125.
1. Salk. 2.
1. Bac. Abr. 4.
85. Forc. 222. Stra. 1082. 1. Com. Dig. "Abatement" (E. 4.). 5. Com. Dig. "Pleader" (E. 32.).

The plaintiff replied, *quod ipse est indigena in regno Angliæ sub ligeantiâ dicti domini regis et dominæ reginæ nunc de patre et matre amicis eorundem domini regis et dominæ reginæ nunc oriundus et natus (b) apud LONDON. præd. in parochiâ et wardâ præd. et non alienigena prout præd. (the defendant) superius allegavit; et hoc petit quod inquiratur per patriam, &c.*

* The defendant demurred generally:

And IT WAS ADJUDGED, that the issue was not well taken, because the plaintiff ought not to have concluded *to the country*; for there being new matter set forth in the replication, he should have given the defendant opportunity to rejoin (c);

(a) See 1. Show. 349.

(b) Post. 405.

(c) See the case of *West v. Sutton*, 1. Salk. 2. that where "*alien nec*" is pleaded in *abatement*, the replication

"*a subject born*" must conclude *to the country*; but when it is pleaded in *bar*, the replication must conclude with a *verification*.

TRINITY TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

Sir Samuel Eyres, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

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• Wilson against Law.

Case 109.

An appeal
of murder
by the bro-
ther and
heir of the
deceased.
Co. Ent.
53. 58.
S. C. 3. 4d.
Ray. 70.

MIDDLESEX, } JOHN
to wit. } LAW,
late of the parish of *Saint
Giles in the Fields*, in the coun-
ty aforesaid, gentleman, was
attached by his body to answer
to *Robert Wilson*, gentleman
the brother and heir of *Edward
Wilson*, gentleman, concern-
ing the death of the aforesaid
Edward, formerly his brother,
whereof he appealeth him;
and there are pledges of prose-
cuting, that is to say, *Charles
Williams*, of the parish of
Saint James, within the liber-
ty of *Westminster*, in the coun-
ty aforesaid, tapettry-maker,
and *John Wheeler*, of the
parish of *Saint Mary le Savoy*,
in the county aforesaid, gen-

MIDD. } JOHANNES
} LAW nuper
*de par-chia SANCTI EGI-
DII IN CAMPIS in com.
præd. generosus attachiat.
fuit per corpus suum ad re-
spondend. ROBERTO WIL-
SON generoso fratris hæredi
EDWARDI WILSON gene-
rosi de morte præd. ED-
WARDI quondam fratris sui
unde eum appellat; et sunt
pleg. de proseguendo scilicet.
CAROLUS WILLIAMS de
parochia SANCTI JACOBI
infra libertatem WESTM. in
com. præd. tapetarius et
JOHANNES WHEELER de
par-chia SANCTÆ MARIÆ
LE SAVOY in com. præd.
generosus; et unde idem RO-*
S 3

Appeal of
murder by
the brother
and heir of
the deceas-
ed.
1. Salk. 59.
2. Salk.
589.

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WILSON
against
LAW.

tleman: and whereupon the said *Robert Wilson*, the brother and heir of the said *Edward Wilson*, in his proper person, instantly appealeth the said *John Law* of it: That when the aforesaid *Edward Wilson* was in the peace of God, and of the lord the now king and of the lady the now queen, at the aforesaid parish of *Saint Giles in the Fields*, in the said county of *Middlesex*, on the ninth day of *April*, in the sixth year of the reign of the LORD WILLIAM and the LADY MARY, by the grace of God of *England, Scotland, France, and Ireland*, KING and QUEEN, defenders of the faith, &c. about the first hour after mid-day, in the same year, came the aforesaid *John Law* feloniously, and as a felon, of the said lord the now king and lady the now queen, lying in wait, and of his malice aforethought and assault premeditated, against the peace of the said lord the now king and lady the now queen, their crown, and dignity, and in the same day, year, hour, and place, with force and arms, &c. feloniously, wilfully, and of his malice aforethought, made an assault upon him the said *Edward Wilson*; and the said *John Law* then and there, with a certain sword made of iron and steel, of the value of five shillings, which he the said *John Law* in his right hand then and there drew, had, and held, then and there violently, feloniously, wilfully, and of his malice aforethought, did strike, stab, and thrust in, and upon the upper part of the belly of him the said *Edward*

BERTUS WILSON frater et hæres præd. EDWARDI WILSON in propria persona sua instantè appellat præd. JOHANNEM LAW de eo quodd ubi præd. EDWARDUS WILSON fuit in pace Dei et domini regis et dominæ reginæ nunc apud prædict. parochiam SANCTI EGIDII IN CAMPIS in prædict. com. Midd. nono die Aprilis anno regni DOMINI GULIELMI et DOMINÆ Mariæ Dei gratia Angl. Scotiæ Franciæ et Hiberniæ regis et reginæ fidei defensor. &c. sexto circa horam primam post meridiem ejusdem diei ibi tunc venit præd. JOHANNES LAW felonice ac ut felo dictorum domini regis et dominæ reginæ nunc insidiando et ex malitia sua præcogitavit. et insult. præmeditat. contra pacem dictorum domini regis et dominæ reginæ nunc coronam et dignitatem suas ac ejusdem die anno hora et loco vi* et armis &c. felonice voluntarie et ex malitia sua præcogitata in ipsum EDWARDUM WILSON injultum fecit et præd. JOHAN. LAW ad tunc et ibidem cum quodam gladio de ferro et chalybe confecto valoris quinque solidorum quem ipse idem JOHAN. LAW in manu sua dextra ad tunc et ibidem extract. habuit et tenuit eundem EDWARDUM WILSON in et super superiorem partem ventris ipsius EDWARDI WILSON juxta pectus et medum corporis ejusdem EDWARDI ad tunc et ibidem violenter felonice voluntarie et ex malitia sua præcogitata percussit pupugit et inforavit ANGLICE did

WILSON
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The count.

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Wilson, near the breast and middle of the body of him the said *Edward*; giving to the said *Edward Wilson*, then and there, with the sword aforesaid, in and upon the aforesaid upper part of the belly of him the aforesaid *Edward Wilson*, near his breast and middle of his body, one mortal wound, of the breadth of two inches, and of the depth of five inches, of which mortal wound indeed the said *Edward Wilson* then and there instantly died; and so the aforesaid *John Law*, then and there, that is to say, on the said ninth day of *April*, in the sixth year aforesaid, about the first hour of mid-day of the same day, at the aforesaid parish of *Saint Giles in the fields*, in the county of *Middlesex* aforesaid, in manner and form aforesaid, feloniously, wilfully, and of his malice aforesaid, hath slain, killed, and murdered, the aforesaid *Edward Wilson*, against the peace of the said lord the now king and the lady the now queen, their crown and dignity: and as soon as the same felon, the said *John Law*, had done the felony and murder aforesaid, he, the said *John Law*, fled, and the aforesaid *Robert Wilson* him the said *John Law* freshly pursued from vill to vill into the four nearest villas, and further until, &c. and if the said felon will deny the felony and murder aforesaid laid to him in form aforesaid, the said *Robert Wilson* is ready to prove this against him, as the court, &c.

Defendant's
traverse,oyer
of writ and
return.

And the aforesaid *John Law*, in his proper person, comes and prays oyer (a) of

strike, stab, and thrust in, dans eidem EDUARDO WILSON adtunc et ibidem cum gladio præd. in et super præd. superiorem partem ventris ipsius præd. EDWARDI WILSON juxta pectus in medium corporis ejus unum vulnus mortale latitudinis duorum pollicium & profunditatis quing. pollicium de quo quidem vulnere mortali idem EDWARDUS WILSON adtunc et ibidem instantiter obiit; et sic præd. JOHANNES LAW adtunc et ibidem scilicet dicto nono die Aprilis anno sexto supradicto circa horam primam post meridiem ejusdem diei apud præd. parochiam SANCTI EGIDII IN CAMPIS in com. MIDDLESEX præd. modo et forma præd. felonice voluntarie et ex malitia sua præcogitata præfat. EDWARDUM WILSON interfecit occidit et murtheravit contra pacem dictorum domini regis et dominæ reginæ nunc coronam et dignitatem suas; et quam cito idem felo dictus JOHANNES LAW feloniam et murtherum præd. fecisset ipse idem JOHANNES LAW fugit prædictusq. ROBERTUS WILSON ipsum cit. JOHANNEM LAW recenter insequutus fuit de villa in villam usq. quatuor villas. propinquiores et ulterius quousq. &c. et si dictus felo feloniam et murtherum præd. ei in forma præd. impositum velit deducere idem ROBERTUS WILSON hoc paratus est versus eum probare prout curia, &c.

WILSON
against
LAW.

The place
where the
wound was.

Fugam fœ

Et præd. JOHANNES LAW in propria persona sua venit et petit auditum

The defend-
ant craves
oyer of the
writ and re-
turn.

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the writ of appeal aforesaid, and the return of the same writ, and they are read to him in these words, *to wit*, "WIL-
" LIAM AND MARY, by the
" grace of God, of England,
" Scotland, France, and Ire-
" land, king and queen, de-
" senders of the faith, &c. To
" the *Sheriff of Middlesex*,
" GREETING: Forasmuch as
" *Robert Wilson*, gentleman,
" the brother and heir of *Ed-
" ward Wilson*, gentleman,
" hath made you secure of
" prosecuting his complaint
" by *Charles Wilson*, of the pa-
" rish of *Saint James*, within
" the liberty of *Westminster*,
" in your county, tapestry-
" maker, and *John Wheeler*,
" of the parish of *Saint Mary
" le Savoy*, in your county,
" gentleman, therefore we
" command you that you at-
" tach *John Law*, late of the
" parish of *Saint Giles in the
" fields*, in your county, gen-
" tleman, by his body, accord-
" ing to the law and custom
" of our kingdom of Eng-
" land, so that you may have
" him before us from the day
" of *Easter* in one month,
" wheresoever we shall then
" be in England, to answer to
" the aforesaid *Robert Wilson*,
" concerning the death of the
" said *Edward Wilson*, for-
" merly his brother, where-
" of he appealeth him; and
" have you then there this
" writ. WITNESS ourselves
" at *Westminster* the nine-
" teenth day of *April*, in the
" sixth year of our reign.
" MARTIN." By virtue of

The return.

(a) See *Rex v. Taylor*, 5. Burr.
2753; that the *oyer* in the case of an
a, peal only initials the party to have

*brevis (a) de appello præd.
et return. ejusdem brevis
et ei leguntur in hæc verba
scilicet, GULIELMUS et
MARIA Dei gratia Angliæ,
Scotiæ, Franciæ, et Hiber-
niæ rex et regina fidei defen-
sores, &c. Vicecom. MID-
DLESEX salutem: Quia RO-
BERTUS WILSON generosus
frater et hæres EDWARDI
WILSON generosi fecit te se-
cur. de clamore tuo proseguendo
per CAROLUM WILLIAMS
de parochia SANCTI JACO-
BI infra libertatem Westm.
in comitatu tuo tapetiarius
et JOHANNEM WHEELER
de parochia SANCTÆ MA-
RIÆ LE SAVOY in comitat.
tuo generosum, ideo tibi præ-
cipimus quod attackias JO-
HANNEM * LAW nuper de
parochia SANCTI EGIDII
IN CAMPIS in comitatu tuo
generosum per. corpus suum
secundum legem et consuetu-
dinem regni nostri Angliæ ita
quod eum habeas eam
nobis a die Paschæ in * num-
mensum ubicunq. tunc fueri-
mus in Angliæ ad respondend.
præfat. ROBERTO WILSON
de morte præd. EDWARDI
quondam fratris sui unde
eum appellat; et habeas ibi tunc
hoc breve. Teste nobis ipsi apud
Westm. xix die Aprilis anno
regni nostr. sextæ. MARTIN.
Virtute istius brevis tibi di-
rect. attack. fieri infranomi-
nat. JOHANNEM LAW per
corpus suum, cujus quidem cor-
pus ad diem infracentem. co-
ram domino reg. et domina
regina ubicunq. &c. parat.
habeo prout interius tibi*

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The return.

the writ and the return read by the
officer of the court, and not to have
a copy of them.

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LAW.

this writ to me directed, I have caused to be attached the within-named *John Law* by his body, whose body indeed I have ready before the lord the king and the lady the queen, wheresoever, &c. as it is within commanded to me: the answer of *Thomas Abney*, knight, and *William Hedges*, knight, sheriff. Which being read and heard, the aforesaid *John Law* defends the force and injury when, &c. and all the felony, and whatsoever, &c. and prays judgment of the original writ and declaration aforesaid; because he saith, that that writ, and the return thereof, and also the declaration thereupon, are not sufficient in law to compel him the said *John Law* to answer thereunto; and that be to the writ aforesaid as aforesaid returned, or to the declaration aforesaid as aforesaid declared, hath no necessity, nor is he bound by the law of the land, to answer; and this he is ready to verify; wherefore he prays judgment of the writ and return, and of the declaration aforesaid, and that the said writ may be quashed, &c. And as to the felony and murder aforesaid, he, the said *John Law*, saith, that he is not guilty thereof, and of good and evil he puts himself upon the county; and the aforesaid *Robert Wilson* likewise, &c.

Demurrer
to the writ
and count.

Pleas not
guilty to the
murder.

Issue.

Joinder in
demurrer
as to the
writ and
the return.

And the aforesaid *Robert Wilson*, as to the aforesaid plea of the said *John Law* above to the writ of him the said *Robert Wilson* aforesaid in form aforesaid pleaded, saith, that the said writ, and the return thereof, and the matter in

præcipit. Respons. THOMAS ABNEY militis et WILLIELMI HEDGES militis vic. Quibus lectis et auditis præd. JOHANNES LAW defendit vim et injuriam quando &c. et omnem feloniam et quicquid &c. et petit judicium de brevi originali et narratione præd. quia dicit quod breve illud et return. inde necnon narratio præd. superinde minus sufficien. in lege existunt ad compellend. eundem JOHAN. LAW adinde respondend. quodq. ipse ad breve præd. sic ut præfertur retornat. seu ad narrationem præd. ut præfertur declarat. necesse non habet nec per legem terræ tenetur respondere; et hoc paratus est verificare; unde petit judicium de brevi retorn. et de narratione præd. et quod breve illud cassetur &c. Et quoad feloniam et nundrum præd. idem. JOHANNES LAW dicit quod ipse non est inde culpabilis, et de bono et malo ponit se super patriam; et præd. ROBERTUS WILSON similiter, &c.

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against
LAW.

Pleas in
abatement
to the writ
and count.

And not
guilty to
the murder;
and issue thereupon.

Et præd. ROBERTUS WILSON quoad præd. placitum prædicti JOHANNIS LAW superius ad breve ipsius ROBERTI WILSON præd. in firma præd. placitat. dicit quod breve illud et return. inde ac materia in ejd. con

Joinder in
demurrer.

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Joinder in
demurrer
as to the
declaration.

the same contained, are good and sufficient in law to compel the said *John Law* to answer thereunto; and this he is ready to verify: wherefore since the said *John Law* hath nothing alledged or assigned in which the said writ or the return thereof is bad, vicious, or defective, he, the said *Robert Wilson*, prays judgment; and that the said writ, and the said return thereof, may be adjudged good and sufficient in law, &c. And as to the said demurrer in law, or plea of the aforesaid *John Law* to the declaration of him the said *Robert Wilson*, the said *Robert Wilson* aforesaid, above in form aforesaid pleaded, he the said *Robert Wilson*, saith, that the said declaration, and the malice in the same contained, so as aforesaid declared, are good and sufficient in law as well to have and maintain in his appeal aforesaid against the said *John Law*, as to compel the said *John Law* to answer thereunto; which declaration indeed, and the malice in the same contained, he, the said *Robert Wilson*, is ready to verify and prove as the court, &c. And because the said *John Law* doth not answer to that plea, nor hath hitherto in any manner denied it, he, the said *Robert Wilson*, prays judgment, and that the said *John Law* may be convicted of the felony and murder aforesaid, &c.

*tent. bona et sufficien. in lege existunt ad prædictum JOHANNEM LAW adinde respondere compellend. et hoc paratus est verificare; unde ex quo dictus JOHANNES LAW nihil allegavit aut assignavit in quo breve illud sive return. ejusdem malum vitiosum seu defectivum existit, idem ROBERTUS WILSON petit judicium et quod idem breve suum et dict. return. ejusdem bona et sufficien. in lege adjudicentur, &c. Et quoad præd. morationem in lege sive placitum prædicti JOHANNIS LAW ad narrationem ipsius ROBERTI WILSON præd. superius in forma præd. placitat. idem ROBERTUS WILSON dicit quod narratio illa materiaq. in eadem content. sic ut præfertur declarat. bon. et sufficien. in lege existunt tam ad appellum suum præd. versus præfat. JOHANNEM LAW habend. * manutenend. quam ad eundem JOHANNEM LAW adinde respondere compellend. quam quidem narrationem materiaq. in eadem content. idem ROBERTUS WILSON paratus est verificare et probare prout curia &c. Et quia præd. JOHANNES LAW ad placitum illud non respondet nec illud bucusque aliquo modo dedit, idem ROBERTUS WILSON petit judicium et quod præd. JOHANNES LAW de feloniam et murder prædictis convincatur, &c.*

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against
LAW.

* [290]

Wilson

A PPEAL OF MURDER. The appellee, after he had craved *Dyer* both of the writ and count, demurred; and, as to the felony and murder, pleaded *not guilty*.

The exceptions following were taken to *the count*, and to *the return*.

FIRST, It is said, that the person killed was on the ninth day of *April, &c.* in the peace of the king, &c. and that the defendant *circa horam primam* of the same day *ex malitiâ suâ præcogitatâ eisdem die et horâ, &c.* assaulted him; now *circa horam primam* is a very uncertain allegation of the time; and therefore of consequence *eisdem die et horâ, &c. insultum fecit* must be as uncertain.

SECONDLY, Here is no direct charge against the defendant; for the words in the declaration do not positively allege that he gave the wound, &c. it is "*percussit, pupugit, et perforavit dans &c.*" when it should have been "*dedit mortale vulnus,*" and so are the precedents in the printed entries (a).

THIRDLY, There is no legal *venue*; for the fact is alleged to be committed in *parochiâ, &c.* when it is expressly required by the statute of *Gloucester* to be in some *vill* or *town* (b).

FOURTHLY, The return is "*attachiari feci,*" when it should have been *attachiavi*, like the writ, which commands *quod capias*, the return whereof is *quod cepi*, and never *quod capi feci* (c). Where a rescous is made from the servant, the sheriff in his return must say that it was from himself, because he is the immediate officer of the court: now in this case it does not appear whether the sheriff himself or his bailiff attached the defendant; and if by a bailiff then the * return by the sheriff is not good, unless it was by a bailiff of a franchise; and for this purpose THE YEAR BOOK of 2. Hen. 4. pl. 4. b. was cited, viz. *King Edward the Fourth* granted to a certain person the office of *bailiff itinerant* in *Hampshire*, and execution of writs, &c. and the sheriff of that county returned a writ thus, viz. "*Mandavi ballivo itineranti qui habet retorn. &c. per chartam regis qui mihi nullum dedit responsum;*" and he was amerced for this return, because the *bailiff itinerant* was not a bailiff of a franchise. Now it cannot be objected that this is helped by the appearance of the defendant; it is true, he came in and appeared upon the return, but demurred for this fault, which is all the appearance he made, so that he is now in court to shew this insufficient return. Neither is it an objection to say that the sheriff's return is not traversable, as in an appeal of murder; the original was returnable *Ostab. Mich.* which was the first return of *Michaelmas Term*, but the writ was not delivered to the sheriff to execute till the sixth of *November* following, and there he returned

An appeal of murder stating that the deceased was alive on such a day, and about such an hour, is good; but if it state the fact to have been committed on the same day and hour, it is bad.

S. C. 1. Salk. 59.
S. C. 2. Salk. 589.
S. C. Comb. 293.
S. C. Carth. 337.
S. C. 3. Salk. 330.
S. C. Skin. 443. 549. 551.
S. C. Holt, 62.
S. C. 1. Ld. Ray. 20.
S. C. Ray. Ent. 101.
3. Mod. 158.
1. Com. Dig. "Appeal" (G. 6.).
2. Hawk. P. C. ch. 23. s. 87.
f. 92.

* [291]

1. Bull. 76.

(a) Raftal's Entries, 48. b. Coke's Entries, 53. and Long's Case, 5. Co. 120.

(b) 2. Inst. 319.
(c) Coke's Entries, 56, 57. 59. Dyer. 199. a.

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"*tarde*," which though true, yet it was held that the party might traverse it. But the case which was chiefly relied on was that of *Morgan v. Egerton* (a) as an authority in point, viz. In an appeal of murder, the writ was returnable *Octab. Mich.*; the old sheriff returned *quod cepi corpus et paratum habeo*, &c. and the new sheriff before the prisoner was delivered over to him returned, *quod istud breve sic mihi deliberat. fuit indorsatum*; and upon a demurrer this was held an ill return, because he had returned nothing done by himself; he said nothing of the body of the prisoner; and the count being against him *in custodia vicemotis*, it does not appear that the new sheriff ever had him in custody; and he shall not be intended to be in custody of the old sheriff, because he is no officer of the court after a new one is chosen; and though the party then appeared *gratis*, yet it was held that such an appearance will not make that good which was defective before upon the return itself.

9. Co. 72.

Keilw. 58.
2. Roll. Rep.
225.
1. Roll. Abr.
779.
placit. 3.
Ld. Ray. 21.

* [292]

THE COUNSEL for the appellant answered only the last exception, which seemed to be the most material, viz. that there was no difference between *attachiari feci*, and *attachiavi*, where the return was not made by a bailiff of a liberty; and this could not be intended to be a return by a bailiff of a franchise, because that is always special, * viz. "*mandavi ballivo libertatis*," which is not in this case, so it must be a return by the sheriff himself; and it might have been done by an itinerant bailiff, and it is then the act of the sheriff himself; for what he had caused to be done by another, shall be taken to be done by him. In the common case of *attachments*, the return is, *quod infranominatus* (the defendant) *attachiatus est per plegios*, which being in the present tense is so uncertain, that it cannot be said by whom he was attached, yet such returns are held good. But the words which follow in this return make it very certain, for after *attachiari feci*, the sheriff says, *cujus quidem corpus paratum habeo prout interius mihi præcipitur*.

Ante, 159.
Ld. Ray 434.
556. 1169.
21. Mod. 229.

CURIA. FIRST, By the statute of Gloucester the time and place where the fact was committed ought to be certainly expressed, or otherwise the appeal shall be abated; now *ci-ca horam primam* is a certain and sufficient averment of the time; it is within the compass of an hour; and though in the case of *Egerton v. Morgan*, three Judges were of a contrary opinion, yet even there COKE and WILLIAMS held that it was certain enough; and the reasons of those two Judges seem to be better warranted by law than the opinions of the other three; and so have the precedents been ever since that time. It is true, the fact cannot be alledged to be done with such a seeming uncertainty as *dedit plagam mortalem circiter pectus*, nor *the year* or *the day*, but *the hour* may, because there is more difficulty in alledging the very *hour* than the *day* or *year*, which are longer measures of time, and therefore are more certain; but my LORD COKE was of opinion, that it was not needful for the appellant to give in evidence the precise hour or the day itself mentioned in the declaration.

4. Co. 40.

2. Inst. 318.

(a) Mich. Term 8. Jac. 1. 1. Bull. 69.

SECONDLY,

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SECONDLY, The charge is direct against the defendant by the word "*dans*," and it had been more uncertain by the word "*dedit*."

Writ sent
against
Law.

THIRDLY, It shall be intended that *the parish* is a vill, unless otherwise shewed by the defendant, and pleaded in abatement; for though the word "*parochia*" is uncertain, because it may include divers vills, yet it shall be intended a vill, unless the contrary is shewn. By the statute of 1. Hen. 5. c. 5. it is ordained, that in original writs in personal actions, and in appeals and indictments wherein *exigents* may be awarded, that *additions* shall be made of the estate, degree, and mystery, and * likewise of the town, hamlet, places or counties where the party is conversant, and if any of these are omitted, the writ shall be abated; and yet where no vill is in a parish, the writ shall be good, viz. "*Præcipe A. de parochiâ, &c.*" because that may be the place where the defendant inhabits.

Co. Lit. 125.

* [293]

22. Hen. 6. 41.
Br. tit. Addition placito 38.
14.
35. Hen. 6. 30.

FOURTHLY, "*attachiari feci prout interius mihi præcipitur*," is a full answer to the writ. The usual return to a *levari facias* is, *quod levavi feci*; so in a *scire facias* against K. the sheriff returned, *quod scire feci K. prout istud breve in se exigit*, without saying *inframinat*. K. yet it was held that those words supply that omission. In *rescous* the return was, that the party was rescued out of the hands of *the bailiff*; it was objected that it should have been out of the hands of *the sheriff*, unless the arrest was by a bailiff of a franchise; yet the return was held good. And so it was in this case.

1. Hen. 6. 6.
Br. tit. Return del Brief, pl. 64.
Sid. 332.
8. Mod. 110.
241. 342. 357.
11. Mod. 64.
12. Mod. 10.
Stra. 531. 1226.
94. 247. 556.

The King and Queen against Owen.

Case III.

BY the statute of 1. Will. & Mary, c. 21. the *custos rotulorum* is to appoint and nominate the CLERK OF THE PEACE when the place is void, who has power by the act to execute it by himself or deputy "for so long time only as he shall demean himself well, &c."

By 1. Will. & Mary, c. 21. the *custos rotulorum* may appoint the clerk of the peace "for so long time only as he shall well demean himself;" and therefore if a clerk of the peace be appointed "during the pleasure of the *custos*," the Court, on his being deprived, will not grant a *mandamus* to restore; for the appointment be-

A mandamus was brought by Mr. Owen, directed to the justices of the peace of Kent to restore him to the office of CLERK OF THE PEACE of that county; and upon the return thereof, the case appeared to be thus:

The Earl of Winchelsea, who was *custos rotulorum* in the first year of William & Mary, appointed Mr. Owen to be clerk of the peace *durante bene placito, &c.*; then the act of 1. Will. & Mary, c. 21. was returned; and that the said Earl was dead; and that afterwards the king constituted the Lord Sydney to be *custos*, who appointed Mr. Saunders to be clerk of the peace, pursuant to the aforesaid act, who thereupon took upon himself the said office, and displaced Mr. Owen, who by this writ desired to be restored.

ing void he cannot shew a title to the office.—S. C. 5. Mod. 314. S. C. Comb. 399. S. C. Skin. 669. S. C. Holt. 190. Ante, 31. 173. Ld. Ray. 158.

The

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* [294]

The question was, Whether a grant of this office *durante bene placito*, which is only an *estate at will*, shall be so governed by the act as to make it an *estate for life*, when once the person is admitted to the office? so that let *the custos* make what appointment he will, though not pursuant * to the statute, it is *the act* and not *the custos* which gives an interest and estate to the person.

It is true, before the statute of 1. Will. & Mary, c. 21. the clerk of the peace was dependent upon *the custos*, not only for his nomination, but for his continuance in the office; but now *the custos* has no manner of interest in the office itself; he is only to nominate the person who shall have it; and when such nominee is admitted, he is not to be removed at the pleasure, or by the death of *the custos*; for the intent of the act is to have a person who should behave himself well in his place, and that he should not be dependent on any man, for that might be a means to make him otherwise; and because the justices of the peace and the people have an interest in this office, viz. in entering records, and drawing up indictments, and dispatching the business of the sessions, therefore the act fixes him in his office, and gives him a more lasting estate therein than he had before, so as not to be removed by the death, or at the pleasure of *the custos*. And this appears more plain by the penning of the act itself; for after *the custos* has nominated the person, he must be admitted by the justices in their quarter sessions, and is to be removed by them if he misbehave himself; and upon such removal, if *the custos* should not appoint another, the justices have power to do it. Now the words in this grant to Mr. Owen, viz. "that he should have the office *durante bene placito* of the "Earl of Winchelsea," cannot make the nomination void *ab initio*, but the words themselves are void and useless, because they are contrary to the statute, which gives no power to create this officer under that limitation, but for "so long time only as he shall behave himself well;" neither shall the acceptance of the grant alter the case, because when once the person is admitted to the office, it is *the statute*, and not *the grantor* which gives him an interest for life; for by nominating the person the grantor has executed his power, and has no farther authority to modify what interest the grantee shall have in his office. It is like a person presented to a living "during the pleasure of the patron," the presentation is good, but the limitation is void; because by the usage and custom of the kingdom a more durable estate is fixed in the presentee. So an institution by the bishop "during pleasure," the first is good, and not to be defeated by the subsequent limitation.

* [295]

* The cases seem to be parallel, for the estate of this officer is as well fixed by this act of parliament as the estates of those are at the common law; and therefore the words "HABENDUM during pleasure" ought to be rejected out of this grant as useless and insignificant. It is true, in conveyances where the party may grant a greater or lesser estate, there the *habendum* is of great use

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use either to enlarge or limit the thing granted; but it cannot be useful where an act of parliament fixes an interest, as in this case. Many more instances may be given where the premises in a deed or grant may be good, and the conditions void: if a feoffment be made in fee upon condition not to alien, the feoffment is good, but the condition is void: so if a gift in tail is made upon condition that the donee shall not suffer a common recovery, the gift is good, but the latter clause is void. And for these reasons it was prayed, that the *mandamus* might be granted.

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E contra. The statute of 1. Will. & Mary, c. 21. does not give the *clerk of the peace* an estate for life; it gives the *custos* power to name him, but not to execute the office for his life, but only for "so long time as he behaves himself well." Now the nomination and the limitation of the estate of the nominee shall not be taken distinctly and apart, for it all makes an entire appointment, and therefore must be taken together; and this being "during pleasure," is void *ab initio*; and if so, the act has made no more of it than the grantor himself has done.

JUDGMENT was afterwards given in *Hilary Term*, that no *peremptory mandamus* should go; for by the act of 1. Will. & Mary, c. 21. the *custos* is to nominate a *clerk of the peace* to execute that office for "so long time as he shall well demean himself, &c." and if he appoint him in any other manner, he is no clerk of the peace; therefore the defendant being appointed by the *Earl of Winchelsea* "during pleasure," it is not pursuant to the act, for he has not executed the authority given to him by the act; and so the defendant has no title.

* [296]
Case 112.

* Newton against Richards.

Easter Term, 6. Will. & Mary, Rod 97.

SCIRE FACIAS against an administrator to shew cause why the plaintiff should not have execution upon a judgment which he obtained against the intestate?

To a *scire facias* *quare executionem non* against an administrator, the defendant may plead that he has no goods of the intestate's in his hands.

The defendant pleaded, *quod nulla habet bona et catalla quæ fuerunt (intestati) tempore mortis suæ in manibus suis administrand. nec habuit die impetrationis brevis præd. nec unquam possea.*

Upon a general demurrer to this plea, it was objected, that it was not good, because the charge was by a judgment, which must be answered in the plea by a discharge of debts upon judgment; for the administrator might pay debts upon specialties and otherwise, and so have *nulla bona* remaining in his hands; but such an

S. C. Salk. 296.
S. C. Comb. 298.
S. C. Skin. 565.
S. C. Holt, 42.
Aller, 48.
Cro. Eliz. 575. Skin. 575. 1. Salk. 296. Prec. Chan. 188. 534. 540. 8. Mod. 283. 10. Mod. 426. 495. 12. Mod. 291. 527. Fitzg. 77. 1. Peer. Wms. 295. 3. Peer Wms. 400. Cases T. T. 217. 5. Comp. Dig. "Pleader" (3. L. 12.). 2. Bac. Abr. 433.

administration

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administration shall not bar the plaintiff of this action; and so it was adjudged in the case of *Ordway v. Godfrey* (a).

But, notwithstanding this objection, the plea was held good, especially upon a *general demurrer*, as this was; but if the plaintiff had *demurred specially*, and shewed it for cause, it might have been otherwise.

(a) Cro. Eliz. 575. But in the case of *Pe chet v. Woolton*, in Hilary Term 23. Car. 1. the case of *Ordway v. Godfrey* seems denied to be law, Allen, 48. But see *Newton v. Richards*, 1. Salk. 296.

Case 113.

Combes against The Hundred of Bradley.

An action upon the statute of Winton, for a robbery.

2. Saund. 375.

GLoucester, } THE men inhabiting in the hundred of *Brad-*
ff. } ley, in the county of *Gloucester*, were at-
tached to answer (a) as well to our present sovereign lord the king and our lady the queen, as to *Thomas Combes*, who sues as well for our said present sovereign lord the king and our lady the queen as for himself in this behalf, of a plea, wherefore by a statute made in the parliament held at *Winton*, in the thirteenth year of the reign of our sovereign lord *Edward the First*, formerly king of *England*, it is among other things ordained, that "Forasmuch
" as from day to day robberies, murders, and burnings be more
" often used than they have been heretofore, and felons cannot be
" attainted by the oath of jurors, who had rather suffer strangers to
" be robbed and so pass without pain, than to indict the offenders,
" of whom great part be people of the same country, or at least if
" the offender be of another country, the receivers are of places
" near, and this they do because an oath is not given unto jurors
" of the same country where such felonies are done; and because
" to the restitution of damages, no pain has hitherto been limited
" for their concealment and laches, our sovereign lord the king, to
" destroy the power, has established a pain in this case, so that
" from henceforth for fear of the pain, more than for fear of any
" oath, they shall not spare nor conceal any felonies; and he com-
" mands that proclamation shall be made in all counties, hundreds,
" markets, fairs, and all other places where great resort of people
" is, so that none shall excuse himself by ignorance, that from
" thenceforth every county be so well kept, that immediately upon
" such robberies and felonies committed, fresh suit shall be made
" from town to town, and from county to county; and also when
" need requires, inquests shall be made in towns by him who is
" lord of the town, and after in the hundred, and in the franchise,
" and in the county, and sometimes in two, three, or four counties
" in case felonies shall be committed in the marches or shires, so
" that the offenders may be attainted: and if the county will not
" answer for the bodies of such manner of offenders, the pain shall

(a) The action upon the statute of Winton, whether brought in the King's bench or Common Pleas, must be com- menced by ORIGINAL, 3. Keb. 126. 2. Saund. 375.

" be

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“be such that every county, that is to say the people dwelling in
 “the county, shall be answerable for the robberies done; and also
 “the damages; so that the whole hundred where the robbery shall
 “be done, with the franchises within the precinct of the same
 “hundred, shall be answerable for the robberies done; and if the
 “robberies be done in the division of two hundreds, both the hun-
 “dreds and the franchises within them shall be answerable; and
 “after the robbery and felony committed, the county shall have
 “no longer space than forty days, within which it shall behove
 “them to agree for the robbery or offence, or else they shall an-
 “swer for the bodies of the offenders,” as in the said statute is
 fully contained. And WHEREAS certain malefactors to the afore-
 said *Thomas* unknown, on the twenty-third day of *February*, in the
 fifth year of the reign of our afore said present lord the king and
 lady the queen, in the hundred of *Bradley*, in the county of *Glou-*
cester, there, in the king’s highway, with force and arms, on the said
Thomas made an assault, and thirty pounds twelve shillings and
 sixpence in monies numbered, the proper monies of the said *Tho-*
mas there found, feloniously, from the said *Thomas*, took and carried
 away, against the peace of our lord the king and lady the queen;
 and the said *Thomas*, there, immediately after the said felony and
 robbery so done as aforesaid, at *Northleach*, * within the hundred
 aforesaid, did make HUE AND CRY of the said felony and robbery so
 done and committed, and then and there did give notice to the inha-
 bitants of the said parish of *Northleach* of the aforesaid robbery and
 felony, and after the said robbery and felony so done and commit-
 ted, and within twenty days next before the suing out of the
 original writ of the said *Thomas*, the said *Thomas*, before *Thomas*
Masters, esq. then and now one of the justices of our said present
 sovereign lord the king and lady the queen within the city of
Gloucester assigned to keep the peace at *Cirencester*, and then in-
 habiting near to the aforesaid hundred of *Bradley*, in the county
 aforesaid, was examined upon his corporal oath according to the form
 of the statute made at *Westminster*, in the county of *Middlesex*, in
 the twenty-seventh year of the reign of the LADY ELIZABETH, late
 queen of *England*, in such case made and provided: and the said
Thomas, then and there, upon his corporal oath aforesaid, deposed
 that he did not know the said parties who so robbed him, or either
 of them. And, after the robbery so done, forty days before the su-
 ing out of the original writ of the said *Thomas* are passed, yet the said
 inhabitants of the hundred aforesaid have not yet made amends to
 the said *Thomas* for the said robbery, nor have they taken the bo-
 dies of the said felons or malefactors, or the bodies of either of
 them, nor have hitherto answered for the bodies of them, or for
 the body of either of them, but have permitted the said felons
 and malefactors to escape, in contempt of our said lord the king
 and lady the queen; to the great damages of the said *Thomas*
Combes; and against the form of the statute in such case made and
 provided: and thereupon the said *Thomas, Combes*, who as well,
 &c. by *Samuel Brewster*, his attorney, complains, For that

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 against
 THE HUNDRED
 OF BRADLEY.

The robbery set
 forth.

The money -
 taken.

* [298]

Oath made be-
 fore a justice of
 the peace,

pursuant to the
 statute of 27.
 Eliz. c. 13.

The count upon
 the writ.

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of Bradley.

* [299]

WHEREAS certain malefactors, to the said *Thomas Combes* unknown, in the king's highway, on the twenty-third day of *February*, in the fifth year of the reign of our lord *William* and lady *Mary*, now king and queen of *England*, at *Hampnot*, in the county of *Gloucester*, within the hundred of *Bradley*, in the county aforesaid, with force and arms, that is to say, with sticks, swords, and hangers, on him the said *Thomas Combes* made an assault, and thirty pounds twelve shillings and sixpence in monies numbered, the proper monies of him the said *Thomas Combes*, then and there found of the said *Thomas Combes*, then and there did steal, take, and carry away, against the peace of our said lord the king and lady the queen : and the said *Thomas Combes*, immediately after the said felony and robbery committed, at *Northleach*, in the hundred of *Bradley* aforesaid, near the aforesaid place where the robbery aforesaid so as aforesaid was done, did make HUE AND CRY of the said felony and robbery so done and committed, and then and there did give notice to the inhabitants * of the said parish of *Northleach* of the aforesaid robbery and felony : and after the said robbery and felony so done and committed, and within twenty days next before the suing out of the original writ of the said *Thomas Combes*, the said *Thomas Combes*, before the aforesaid *Thomas Masters*, esq. then and now one of the justices of our lord the king and lady the queen assigned to keep the peace in the county aforesaid, and then inhabiting at *Cirencester* aforesaid, near the said hundred of *Bradley*, in the county aforesaid, was examined on his corporal oath according to the statute made at *Westminster*, in the county of *Middlesex*, in the twenty-seventh year of the reign of *LADY ELIZABETH*, formerly queen of *England*, in such case made and provided ; and the said *Thomas Combes*, upon his corporal oath aforesaid, then deposed that he did not know the said parties who had so robbed him, or either of them : and that after the said robbery so done, forty days before the suing forth of the original writ of the said *Thomas Combes* are passed, yet the said inhabitants of the said hundred have not yet made amends to the said *Thomas Combes* for the said robbery, nor have they taken the bodies of the said felons or malefactors, or the bodies of either of them, nor have hitherto answered for the bodies of them, or for the body of either of them, but have permitted the said felons and malefactors to escape, in contempt of our said lord the king and lady the queen, to the great damage of the said *Thomas Combes*, and against the form of the statute aforesaid in the thirteenth year of the reign of *Edward the First* late king of *England* aforesaid in such case made and provided. WHEREFORE he says that he is injured, and hath sustained damages to the value of fifty pounds : and therefore he brings his suit.

The defendants
plead not guilty.

And the aforesaid men inhabiting within the said hundred of *Bradley* aforesaid, by *Richard Longford* their attorney, come and defend the force and injury when, &c. and say that they are not guilty of the premises aforesaid, whereof the said *Thomas Combes* has above complained against them, as well for &c. ; and of this they put themselves upon the country ; and the said *Thomas Combes*, who

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who as well, &c. doth the like. And hereupon the said *Thomas Combes* says, that the men inhabiting within the said hundred of *Bradley*, where the said robbery was done, are the parties defendants against whom the said *Thomas Combes*, who as well, &c. above in form aforesaid above complains, and for that cause prays a writ of our lord the king and lady the queen, wheresoever, &c. to be directed to the sheriff of the county aforesaid, to cause to come twelve free and lawful men of the neighbourhood of the hundred of *Slaughter*, in the county aforesaid; which said hundred of *Slaughter* is the next hundred in the same county next adjoining to the said hundred of *Bradley*, to try the issue aforesaid above in form aforesaid joined. And because the said inhabitants of the said hundred of *Bradley* do not deny the allegation aforesaid, therefore the said sheriff is commanded that he cause to come before the said lord the king and lady the queen, on the octave of the Purification of the Blessed Virgin Mary, wheresoever, &c. twelve, &c. of the neighbourhood aforesaid of the hundred of *Slaughter* * aforesaid, by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same day is given as well to the said *Thomas Combes*, who as well, &c. as to the said inhabitants of the said hundred of *Bradley* aforesaid.—AND AFTERWARDS, the process thereof between the parties aforesaid, in the plea aforesaid, being continued by the jury thereof between them, being respited before the king and queen until fifteen days next after *Easter*, wheresoever, &c. then next following, unless the Justices of the lord the king and the lady the queen, assigned to take assizes in the county aforesaid, shall first come on *Saturday* the third day of *March*, at *Gloucester*, in the county aforesaid, by the form of the statute, &c. for writ of jurors, &c.; on which day before the lord the king and lady the queen at *Westminster*, come the said parties by their attornies aforesaid, and the said Justices of the said lord the king and lady the queen of assize, before whom, &c. have sent here their record before them, had in these words: AFTERWARDS, at the day and place within contained, before *GILES EYRES, Knt.* one of the Justices of the lord the king and the lady the queen assigned to hold pleas before the said king and queen themselves, and *THOMAS BRETON, esq.* the aforesaid *GILES EYRES, Knt.* and *NICHOLAS LECHMERE, Knt.* one of the Barons of the Exchequer of our said lord the king and lady the queen, Justices of the same lord the king and lady the queen assigned to take assizes in the county of *Gloucester*, by the form of the statute, &c. for this turn allocated, the aforesaid *NICHOLAS LECHMERE* not expected; by virtue of the writ of the said lord the king and lady the queen of *si non omnes*, &c. come as well the within-named *Thomas Combes*, who sues as well for the lord the king and lady the queen as for himself in this behalf, as the within-written inhabitants of the hundred of *Bradley*, by their attornies within-contained. And the jurors of the jury, whereof mention is within made, being called, come, who being elected, tried, and sworn to speak the truth of the matter within contained, say upon their oath, "That

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against
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OF BRADLEY.

Suggestion for a
jury of another
hundred.

* [300]

The Process.

Special verdict.

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against
THE HUNDRED
OF BRADLEY.

* [301]

The oath of the
party robbed.

* [302]

Part of the mo-
ney was the
money of an-
other, and not
of the plaintiff.

“ certain malefactors aforesaid to the said *Thomas* unknown, on
“ the twenty-third day of *February*, in the fifth year of the reign
“ our lord the now * king and our lady the now queen, at *Hampnot*,
“ in the hundred of *Bradley*, in the county of *Gloucester*, in the
“ king’s high-road, there, with force and arms, upon him the said
“ *Thomas Combes* made an assault, and thirty pounds twelve shil-
“ lings and sixpence in monies numbered, there found, feloniously
“ from the said *Thomas* stole, took, and carried away, against the
“ peace of the lord the now king and lady the now queen : and
“ the same *Thomas* immediatly after the felony, robbery, and
“ spoliation within written done, at *Northleach*, in the hundred
“ aforesaid, HUE AND CRY of the robbery and felony within-
“ written made, and then and there gave notice to the inhabitants
“ of the said vill of *Northleach* aforesaid, in due manner, of the
“ robbery and felony within-written done : and after the same
“ robbery and felony done, and within twenty days next before
“ the suing out of the original writ of the said *Thomas*, the same
“ *Thomas*, before *Thomas Masters, esq.* then and now one of the
“ Justices of the lord the now king and the lady the now queen
“ assigned to keep the peace in the aforesaid county of *Gloucester*, and
“ then inhabiting at *Cirencester* aforesaid, near the said hundred of
“ *Bradley*, in the county aforesaid within written, was examined upon
“ his corporal oath according to the statute at *Westminster*, in the
“ twenty-seventh year of the reign of the LADY ELIZABETH, late
“ queen of *England*, in such case made and provided ; and upon his
“ oath aforesaid, before the aforesaid *Thomas Masters*, then deposed
“ in manner and form as is afterwards mentioned and not otherwise :
“ *Gloucester. MEMORAND.* That upon the seventh day of *June* in the
“ fifth year of the reign of our sovereign lord and lady king *Wil-*
“ *liam* and queen *Mary*, over *England*, &c. in the year of our Lord
“ 1603, *Thomas Combes*, of *Fairford*, in the county of *Gloucester*, ser-
“ vant to *Andrew Barker*, of *Fairford* aforesaid, esq. came before
“ me *Thomas Masters*, one of their majesties justices of the peace
“ for the said county of *Gloucester*, and took his corporal oath, that
“ upon *Thursday* the 23d day of *February* last past, between the
“ hours of two and three of the clock in the afternoon of the same
“ day, at the said *Thomas* was travelling from *Fairford* aforesaid
“ towards *Troxbury* in the said county of *Gloucester*, he was set
“ upon in a field near *Hampnot*, in the hundred of *Bradley*, in the
“ said county of *Gloucester*, by three horsemen armed with swords
“ and pistols, who there made an assault upon him the said *Thomas*
“ *Combes*, and did then and there feloniously take from him the
“ said *Thomas Combes* thirty pounds twelve shillings and six-
“ pence, and one sorrel mare, which mare is since returned to
“ *Fairford* aforesaid ; thirty pounds and eleven shillings of which
“ said money was * the proper monies of the said *Andrew Barker*
“ his master, and the other one shilling and sixpence was the proper
“ money of him the said *Thomas Combes* : and the said *Thomas Combes*
“ farther deposed, that the said three horsemen which so took away
“ the said money and mare from him were strangers, and altogether
“ unknown

" unknown to him the said *Thomas Combes*; and that the said *Thomas Combes* immediately, after he was so robbed, went to *North-leach*, a market-town in the said hundred, and there made HUE AND CRY after the said persons that robbed him." And the same jurors upon their oath aforesaid further say, that the thirty-nine pounds twelve shillings and sixpence in the within-written declaration mentioned, were the proper monies of *Andrew Barker*, esq. the then master of the aforesaid *Thomas Combes*, received by the aforesaid *Thomas Combes* for the use of the aforesaid *Andrew Barker*, his said master: and the same jurors upon their oath aforesaid further say, that the aforesaid *Andrew Barker* was not present when the robbery aforesaid was committed. But whether upon the whole matter, by the jurors aforesaid in form aforesaid found, the aforesaid inhabitants of the hundred of *Bradley* are guilty of the premises in the within-written declaration laid to their charge, against the form of the statute in the declaration mentioned or not, the jurors aforesaid are wholly ignorant, and pray thereupon the advice and consideration of the Court, &c. And if upon the whole matter aforesaid it shall seem to the court of the lord the king and lady the queen here, that the aforesaid inhabitants of the hundred of *Bradley* aforesaid are guilty of the premises in the within-written declaration laid to their charge, against the form of the statute aforesaid, then the said jurors say upon their oath aforesaid, that the inhabitants of the hundred of *Bradley* aforesaid are guilty thereof, as the aforesaid *Thomas Combes* who prosecutes, &c. within thereof complains against them; and they assess the damages of him the said *Thomas Combes* by occasion thereof, besides his costs and charges by him laid out about his suit in this behalf, to thirty pounds twelve shillings and sixpence, and for those costs and charges to forty shillings. But if upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, it shall seem to the court of the lord the king and lady the queen here, that the inhabitants of the hundred of *Bradley* aforesaid are not guilty of the premises aforesaid, then the jurors aforesaid upon their oath aforesaid say, that the aforesaid inhabitants of the hundred of *Bradley* aforesaid are not guilty of the premises within laid to their charge by the declaration aforesaid, as the said *Thomas Combes* within in pleading thereupon hath alledged. And because the court of the said lord the now king and lady the now queen here is not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid, until before the lord the king and lady the queen, wheresoever, &c. to hear their judgment of and upon the premises; for that the court of the lord the king and lady the queen here is not yet advised thereof, &c.

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* [303]

Continuance.

THE CASE upon the pleadings was thus : An action was brought upon the STATUTE OF WINTON, for that upon the three-and-twentieth day of *February 5. Will. & Mary* certain malefactors to the plaintiff unknown, did assault him at *Hampnot* in the hundred of *Bradley* in the county of *Gloucester*, and robbed him of 30l. 12s. 6d. of his *own money*, whereof he immediately gave notice at *Northbleach* within the said hundred, and near the place where he was robbed, and that none of the thieves were taken. Upon not guilty pleaded, a special verdict was found at the assizes.

S.C. Comb. 263. THE JURY find the assault, robbery, and taking from the plaintiff 30l. 12s. 6d. and a mare which returned, and that 30l. 11s. of the said money was the proper money of *Andrew Barker* his master, who was not present when the robbery was committed, but that the plaintiff had the same in his possession for the use of his said master, and that the robbers were strangers to him ; and so made a general conclusion.

The single question was, Whether *the servant* being robbed of his master's money (he being not present) may bring the action against the hundred, and declare *de denariis suis propriis* being taken away ?

SIR FRANCIS WINNINGTON held, that the action was well brought, though it appears both by the affidavit and the verdict that it was the money of the master ; for it was the usual course in former times for the servant alone to bring the action, and the master seldom or never appeared in it. The statute of 3. *Edw. 1. c. 9.* was made for the general preservation and quiet of travellers, whether masters or servants, and therefore either of them might bring the action. This was the opinion of *DODERIDGE* and *JONES*, who were learned Judges, in the case of *Drope v. Thaire* reported by *Mr. Latch (a)* ; nay, in some cases it has been ruled, that the master ought not to bring the action, because the servant (being the person robbed) is enjoined by the statute of 27. *Eliz. c. 13.* to make oath that he did not know any of the robbers (*b*). A bailiff or receiver of rents was robbed, and he declared *de denariis ipsius querentis* ; and it was held good (*c*), because he is accountable to his master, which is this very case : wherever the party has a property, he may bring the action against the wrong-doer ; and this is the reason why a *common carrier* may sue for goods taken from him, though not his own. But there is a case (*d*) which comes yet more near to this ; it was an action brought by a servant who was robbed of goods, part of which belonged to his master, and the rest to himself ; and he declared in his *own name* against the hundred, and had a verdict as

(a) *Latch*, 127.

(b) *Cro. Eliz.* 142. 1. *Leon.* 345.

(c) 2. *Leon.* 82.

(d) 1. *Brownl.* 155.

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to his own, and the matter was found specially as to the goods of his master; yet he had judgment, which must be upon the special finding: and for these reasons, and upon these authorities, he prayed judgment for the plaintiff.

COMBES
against
THE HUNDRED
OF BRADLEY

E CONTRA, It was argued, That the master ought to bring the action, because it was his money which was lost; but for the servant to declare *de denariis suis* is not true; for he had no property in the money, neither is he answerable for its being taken from him. This is not like the case of a common carrier, for he has a reward and a recompence for carrying the goods of other men, and therefore is responsible for them, by law, if lost or taken from him, which a servant is not. If a sheriff levy goods by virtue of a *feri facias*, which goods are afterwards taken from him, though they are not his own, yet he may maintain an action of trover (a); and the reason is, because by the seizure he has a property in them by law; but a servant has no manner of property in the money or goods of his master, and therefore if robbed, whether his master be present or absent (for that makes no alteration in the case), the master who has the property must bring the action. Thus it was adjudged in the case of *Raymund v. the Hundred of Woking* (b), the servant made the oath, and the master brought the action, and resolved so it ought to be; and upon a writ of error brought in the king's bench, that judgment was affirmed. So it was likewise in that very case of *Drope v. Thaire* (c) cited on the other side, viz. The servant lodged in an inn, and his master's goods were lost, who brought the action; and though it * was said by DODERIDGE and JONES that the servant might have an appeal of robbery, yet it seems to be only a sudden opinion of those Judges, for the law is otherwise, viz. that the servant cannot bring an appeal; and in the same case reported by POPHAM, Justice (d), JONES, Justice, was of another opinion, viz. that if the servant be robbed, the master shall bring the action. In *Green's Case* (e) the servant was robbed, and the master brought the action, and had recovered a verdict; but because the oath was made by him, and not by the servant who was robbed, the judgment was stayed; for he might know some of the robbers, though his master did not. In *Tracey v. Veal* (f) a man by counterfeit letters got money out of the servant's hands, and the master brought an action on the case for the deceit. And in the same Term in the case of *Beedle v. Morris* (g), the servant being robbed in an inn the master brought the action, and had judgment, which was affirmed afterwards in THE EXCHEQUER CHAMBER (h). So where the master was present when his servant was robbed, yet the master brought the action against the hundred (i): and likewise where a post-boy was robbed in the presence of the owner of the goods,

* [305]

(a) 2. Saund. 47.

(b) Cro. Car. 37. 336.

(c) Latch, 127.

(d) Poph. 178.

(e) Cro. Eliz. 142. 1. Leon. 323.

(f) Cro. Jac. 223.

(g) Cro. Eliz. 224.

(h) Co. Ent. 347.

(i) Yelv. 162.

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COMBES
against
THE HUNDRED
OF BRADLEY.

and he brought the action (a). These and many more cases may be brought to prove that it has been the constant opinion, that the master ought to bring the action where the servant has been robbed.—Then as to the *possession*, it is not at all material to support the action brought by the servant, for it is the *property* only which is to be considered; and for this purpose a late case was cited, which was between *Pinkney* and the inhabitants of the east-hundred in *Rutland* (b): The plaintiff brought an action upon the STATUTE OF WINTON, and declared for the taking from him of twenty-nine pounds *de pecuniis propriis*, and likewise for other goods taken out of his possession; and, upon a demurrer to the declaration, it was held, that the action was not well brought for the goods taken out of his possession (c), and therefore as to them a *remissit damna* was entered, and he had judgment for his money; which shews that the bare *possession*, without a *property*, was not regarded.

Adjournatur.

Afterwards the plaintiff had judgment by the opinion of THE WHOLE COURT, and that in this case either *the master* or *the servant* might maintain the action.

(a) Stiles, 156. 319.

(b) 2. Saund. 374.

(c) The plaintiff did not shew the particulars of the goods, nor that they

were his own goods, and that was the reason of the judgment as to the goods, 2. Saund. 380.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

Sir Samuel Eyres, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

Memorandum.

SIR ROBERT ATKINS, *Chief Baron* of the Exchequer,
resigned his office at the beginning of this Term.

Case 115.

* Lampton *against* Collingwood.

* [306]

Case 116.

PLEAS before the lord the king at *Westminster*, in the Term of
Saint Hilary, in the sixth year of the reign of the lord WILLIAM THE THIRD, *King of England, &c.* ROLL 309.

Plea roll.

ENGLAND *to wit*.—THE lord the king hath sent to his Justices assigned to hold pleas before the king himself his writ close in these words, *viz.* "WILLIAM THE THIRD, by the grace of God of
" *England, Scotland, France, and Ireland*, king, defender of the
" faith, &c. To our Justices assigned to hold pleas before us
" greeting : We have received information from the grievous
" complaint of *Anne Lampton*, widow, executrix of the goods and
" chattels which were of *Robert Lampton*, *esq.* deceased, that
" whereas one *Luke Collingwood* lately, that is to say, in the
" Term of *Easter*, in the thirty-fourth year of the reign of the lord
" CHARLES THE SECOND, late *King of England, &c.* in the court
" of the same late king himself at *Westminster*, in the county of
" *Middlesex*, by the judgment of the same court, had recovered

Writ of audita querela.

Judgment recorded against two defendants.

" against

Michaelmas Term, 6. William & Mary, In B. R.

LAMPTON
against
COLLING-
WOOD.

One of them
dies and the
other survives.

Scire facias sued
out against the
administratrix
of the deceased.

“ against the aforesaid *Robert Lampton*, and one *Edmund Craister*,
“ esq. by the names of *Edmund Craister*, of *Craister*, in the county
“ of *Northumberland*, esq. otherwise called *Edmund Craister*, of
“ *Craister*, in the county aforesaid, esq. and *Robert Lampton*, of
“ *Newham*, in the county of *Northumberland*, esq. otherwise
“ called *Robert Lampton*, of *Newham*, in the county aforesaid,
“ gentleman, four hundred pounds of debt, and also forty shillings
“ which to him the said *Luke* in the same court were adjudged
“ for his damages which he sustained as well by occasion of the
“ detention of that debt as for his costs and charges by him laid
“ out about his suit in that behalf, whereof they were convicted,
“ as by the record and process thereof in our court before us at
“ *Westminster* aforesaid remaining more fully appears: and after-
“ wards the aforesaid *Robert*, in the life-time of the aforesaid
“ *Edmund*, that is to say, on the first day of *November*, in the first
“ year of the reign of the lord *JAMES THE SECOND*, late *King of*
“ *England*, died, and he the said *Edmund* survived him the said
“ *Robert*, to wit, at *Morpeth*, in the county of *Northumberland*,
“ by which, by the laws of *England*, the goods and chattels which
“ were of the aforesaid *Robert* at the time of his death, being in the
“ hands of whatsoever administrator or administratrix of those
“ goods and chattels to be administered, became absolutely dis-
“ charged of the debt and damages aforesaid, as she the said *Anne*
“ is ready to prove by such ways and means as are fit (conve-
“ nient): nevertheless the aforesaid *Luke*, contriving and intend-
“ ing her the said *Anne*, by pretext of the judgment aforesaid,
“ unjustly to aggrieve and greatly to damnify, heretofore, after the
“ death of him the said *Robert*, that is to say, in the Term of the
“ *Holy Trinity*, in the fifth year of our reign and of the *Lady*
“ *Mary*, late *Queen of England*, &c. prosecuted out of the afore-
“ said court at *Westminster*, our certain writ (and of our late
“ *Queen Mary*) of *scire facias* of and upon the judgment aforesaid
“ against the aforesaid *Anne*, administratrix of the goods and
“ chattels aforesaid of the aforesaid *Robert*, directed to the then
“ sheriffs of *London*; by which said writ, RECITING, that whereas
“ the aforesaid *Luke* lately, in the court of the said late king
“ *Charles the Second*, before himself the said late king at *West-*
“ *minster*, by bill, without the writ of the said late king, and by
“ the judgment of the same court, had recovered against the afore-
“ said *Edmund Craister*, otherwise called *Edmund Craister*, of
“ *Craister*, in the county aforesaid, esq. and the aforesaid *Robert*
“ *Lampton*, otherwise called *Robert Lampton*, of *Newham*, in the
“ county aforesaid, gentleman, the aforesaid four hundred pounds
“ of debt, and also the aforesaid forty shillings for his damages
“ which he sustained, as well by the occasion of the detention of
“ that debt as for his costs and charges by him laid out about his
“ suit in that behalf whereof they were then convicted, as it ap-
“ peared of record; RECITING ALSO, and suggesting, that the
“ aforesaid *Edmund*, on the second day of *July*, in the fourth year
“ of the reign of the lord *James the Second*, late *King of England*,
“ &c. at *London*, in the parish of the *Blessed Mary-le-Bow*, in the
“ ward

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ward of *Cheap*, died ; and that the aforesaid *Robert* survived him ; and that afterwards the aforesaid *Robert*, on the first day of *April*, in the second year of our reign and of our said late queen, at *London* aforesaid, in the parish and ward aforesaid, died intestate ; and that after his death, administration of all and singular the goods and chattels, rights and credits, which were of the aforesaid *Robert* at the time of his death, was committed to the aforesaid *Anne Lampton* (the debt and damages aforesaid not being satisfied to the aforesaid *Luke*) ; and that the aforesaid *Luke* had besought us and our said late queen of a fitting remedy in that behalf to be provided for him ; we and our said late queen willing what was just in that behalf to be done, by the same writ commanded the said sheriffs of *LONDON*, that by honest and lawful men of their bailiwick they should give notice to the aforesaid *Anne* that she should be before us and our said late queen at *Westminster* aforesaid, on *Tuesday* next after fifteen days of the *Holy Trinity* then next following, to shew if any-thing she had or knew to say for herself why the aforesaid *Luke* ought not to have his execution of the debt and damages aforesaid, of the goods and chattels which were of the aforesaid *Robert* at the time of his death in the hands of her the said *Anne* to be administered, if it should seem expedient to him ; and further to do and receive that which the aforesaid court before us and our late queen should then and there consider thereof in that behalf ; and that they should have then there the names of those persons by whom they should give notice to her, and that writ, &c. AT WHICH DAY, in the same court before us and our said late queen at *Westminster*, came the aforesaid *Luke* in his proper person, and the sheriffs of *London* aforesaid, TO WIT, *Thomas Lane, Knight*, and *Thomas Cooke, Knight*, then returned to us and our aforesaid late queen upon the writ aforesaid, that the aforesaid *Anne* had nothing in their bailiwick, where or by which they could give the notice, neither was she found in the same ; and the said *Anne* did not come ; therefore, as before, by the same court it was then commanded to the same sheriffs of *London*, that by honest and lawful men of their bailiwick they should give notice to the aforesaid *Anne* that she should be before us and our said late queen at *Westminster*, on *Tuesday* next after three weeks of the *Holy Trinity* then next following, to shew, in form aforesaid, if, &c. and further, &c. The same day was given by the same court there before us and our said late queen, to the aforesaid *Luke* there, &c. : at which day in the aforesaid court, before us and our said late queen, came the aforesaid *Luke* in his proper person, and the sheriffs of *London* aforesaid as before returned, that the aforesaid *Anne* had nothing in their bailiwick where or by which they could give notice to her, neither was she found in the same ; and the aforesaid *Anne*, although at that day being solemnly required, did not come, but made default : THEREFORE it was then and there considered by the same court, before us and the aforesaid late queen,

LAMPTON
against
COLLING-
WOOD.

The sheriffs re-
turn nihil.

Alias scire facias
awarded.

The sheriffs re-
turn nihil.

Michaelmas Term, 6. William & Mary, In B.R.

LAMPTON *against* COLLINGWOOD. Execution adjudged upon the *scire facias* by default.

Although the administratrix was never summoned nor did appear.

The plaintiff's *gravamen*.

Audita querela.

“ queen, that the aforesaid *Luke* should have execution of the debt and damages aforesaid, of the goods and chattels which were of the aforesaid *Robert* at the time of his death in the hands of her the said *Anne* to be administered, as by the record and process thereof in our court before us at *Westminster* aforesaid remaining more fully appears; and he the said *Luke* purposes and threatens to sue out execution against her the said *Anne* of the debt and damages aforesaid, to be levied of the goods and chattels aforesaid, although she the said *Anne* was never summoned in the aforesaid plea of *scire facias* to shew cause why the said *Luke* ought not to have such execution against her, neither did she appear in that plea; also although she the said *Anne*, and those goods and chattels, for the cause aforesaid, ought of right to be discharged thereof, to the grievous damage and hardship of her the said *Anne*, and against the law and custom of our kingdom of *England*; WHEREUPON she the said *Anne* hath besought us of a fitting remedy to be provided for by us in this behalf: WE, being unwilling that the said *Anne* be in any wise injured, and willing that which is just to be done in this behalf, do command you that having heard the complaint of the aforesaid *Anne*, and having called before you the parties aforesaid, and others whom you shall see fit to be called in this behalf, and having from thence heard their reasons thereupon, you cause to be done to the parties aforesaid full and speedy justice, as of right, and according to the law and custom of our realm of *England*, shall be meet to be done. WITNESS ourself at *Westminster*, the twenty-third day of *January*, in the sixth year of our reign.

“ PLUMPTON.”

The declaration upon the writ.

Recovery of the judgment in the King's Bench.

AFTERWARDS, to wit, on *Wednesday* next after fifteen days of *Saint Hilary*, in this same Term, before the lord the king at *Westminster*, cometh the aforesaid *Anne Lampton*, by *Nicholas Harding* her attorney, and immediately saith, that the aforesaid *Luke* ought not to have execution against her the said *Anne* of the debt and damages aforesaid, to be levied of the goods and chattels which were of the aforesaid *Robert Lampton* at the time of his death in the hands of her the said *Anne*, because she saith, that the aforesaid *Luke Collingwood* lately, that is to say, in the Term of *Easter*, in the thirty-fourth year of the reign of the said late king *Charles the Second* abovesaid, in the court of the same late king, before the said late king himself at *Westminster*, in the county of *Middlesex* aforesaid, by the judgment of the same court had recovered against the aforesaid *Robert Lampton*, and the aforesaid *Edmund Craister*, by the name of *Edmund Craister*, &c. (as in the writ above) the aforesaid four hundred pounds of debt, and also forty shillings which to him the said *Luke* in the same court were adjudged for his damages which he sustained, as well by occasion of the detention of that debt as for his costs and charges by him laid out about his suit in that behalf whereof they were convicted, as by the record and process thereof in the court of the said lord the now king,

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king, before the king himself at *Westminster* aforesaid remaining more fully appears. And she the said *Anne* further saith, that afterwards the aforesaid *Robert*, in the life-time of the aforesaid *Edmund*, that is to say, on the first day of *November*, in the first year of the reign of the said late king *James the Second* aforesaid, died, and he the said *Edmund* survived him the said *Robert*, to wit, at *Morpeth* aforesaid, in the county of *Northumberland* aforesaid; by which by the law of *England* the goods and chattels which were of the aforesaid *Robert* at the time of his death, being in the hands of whatsoever administrator or administratrix of those goods and chattels to be administered; became absolutely discharged of the debt and damages aforesaid, as she the said *Anne* is ready to prove by such ways and means as are fit [convenient]; nevertheless the aforesaid *Luke*, contriving and intending her the said *Anne*, by pretext of the judgment aforesaid, unjustly to aggrieve and greatly to damnify, heretofore, after the death of him the aforesaid *Robert*, that is to say, in the Term of the *Holy Trinity*, in the fifth year of the reign of the *Lord William*, now *King of England*, &c. and of the *Lady Mary*, late *Queen of England*, &c. prosecuted out of the aforesaid court then before the said lord the now king and the said late *Queen Mary*, at *Westminster* aforesaid, a writ of the said lord the now king and of the said late queen of *scire facias* of and upon the judgment aforesaid, against the aforesaid *Anne*, administratrix of the goods and chattels of the aforesaid *Robert*, directed to the then sheriffs of *London*; by which said writ, reciting, that whereas the aforesaid *Luke* lately, in the court of the said late king *Charles the Second*, before himself the said late king at *Westminster*, by bill, without the writ of the said late king, and by the judgment of the same court, had recovered against the aforesaid *Edmund Craister*, otherwise called *Edmund Craister*, of *Craister*, in the county aforesaid, esq. and the aforesaid *Robert Lampton*, otherwise called *Robert Lampton*, of *Newham*, in the county aforesaid, gent. the aforesaid four hundred pounds of debt, and also the aforesaid forty shillings for his damages which he sustained as well by occasion of the detention of that debt as for his costs and charges by him laid out about his suit in that behalf whereof they were then convicted, as it appeared of record; reciting also, and suggesting, that the aforesaid *Edmund*, on the second day of *July*, in the fourth year of the reign of the lord *James the Second*, late *King of England*, &c. aforesaid, at *London* aforesaid, in the parish of the *Blessed Mary of the Arches*, in the ward of *Cheap*, died; and that the aforesaid *Robert* survived him the said *Edmund*; and that afterwards, on the first day of *April*, in the second year of the reign of the said *Lord William* the now king and of the *Lady Mary* late *Queen of England* aforesaid, at *London* aforesaid, in the parish and ward aforesaid, he died intestate; and that, after his death, administration of all and singular the goods and chattels, rights and credits, which were of the aforesaid *Robert* at the time of his death was committed to the aforesaid *Anne Lampton* (the debt and damages aforesaid not being satisfied to the aforesaid *Luke*); and that

LAMPTON
against
COLLING-
WOOD.

One of the de-
fendants in the
judgment dies.

Scire facias sued
out against the
administratrix
of the deceased.

Michaelmas Term, 6. William & Mary, In B. R.

LAMPTON
against
COLLING-
WOOD.

that the aforesaid *Luke* had besought the aforesaid *Lord William* the now king, and the *Lady Mary*, late *Queen of England*, of a fitting remedy in that behalf to be provided for him; and that the said lord the now king and the said late queen, willing what was just in that behalf to be done, by the same writ commanded the said sheriffs of *London*, that by honest and lawful men of their bailiwick they should give notice to the aforesaid *Anne* that she should be before the said lord the now king and the said late queen at *Westminster* aforesaid, on *Tuesday* next after fifteen days of the *Holy Trinity* then next following, to shew if any-thing she had or knew to say for herself why the aforesaid *Luke* ought not to have his execution of the debt and damages aforesaid, of the goods and chattels which were of the aforesaid *Robert* at the time of his death in the hands of her the said *Anne* to be administered, if it should seem expedient to him, and further to do and receive that which the aforesaid court before the said lord the now king and the said late queen should then and there consider thereof in that behalf; and that they should have then there the names of those persons by whom they should give notice to her, and that writ, &c. At which day, in the same court, before the said lord the now king and the said late queen at *Westminster*, came the aforesaid *Luke*, in his proper person, and the sheriffs of *London* aforesaid, to wit, *Thomas Lane, Knight*, and *Thomas Cooke, Knight*, then returned to the said lord the now king and to the said late queen upon that writ, that the aforesaid *Anne* had nothing in their bailiwick where or by which they could give her notice, neither was she found in the same, and that the said *Anne* did not come; therefore, as before, by the same court it was then commanded to the same sheriffs of *London*, that by honest and lawful men of their bailiwick they should give notice to the aforesaid *Anne* that she should be before the said lord the now king and the said late queen at *Westminster*, on *Tuesday* next after three weeks of the *Holy Trinity* then next following, to shew in form aforesaid, if, &c. The same day was given by the same court then before the said lord the now king and the said late queen to the aforesaid *Luke* there, &c. At which day, in the aforesaid court, before the said lord the now king and the said late queen at *Westminster* came the aforesaid *Luke* in his proper person, and the sheriffs of *London* aforesaid as before returned, that the aforesaid *Anne* had nothing in their bailiwick where or by which they could give notice to her, neither was she found in the same; and the aforesaid *Anne*, although at that day being solemnly required, did not come, but made default; therefore it was then and there considered by the same court, before the said lord the now king and the said late queen, that the aforesaid *Luke* should have execution of the debt and damages aforesaid, of the goods and chattels which were of the aforesaid *Robert* at the time of his death in the hands of her the said *Anne* to be administered, as by the record and process thereof in the court of the aforesaid lord the now king before the king himself at *Westminster* remaining more fully appears; and he the said *Luke* purposes and threatens

Michaelmas Term, 6. William & Mary, In B. R.

threatens to sue out execution against her the said *Anne* of the debt and damages aforesaid, to be levied of the goods and chattels aforesaid, although she the said *Anne* was never summoned in the aforesaid plea of *scire facias*, to shew cause why the said *Luke* ought not to have such execution against her, neither did she appear in that plea; also, although she the said *Anne*, and those goods and chattels, for the cause aforesaid, ought of right to be discharged thereof, to the grievous damage and hardship of her the said *Anne*, and against the law and custom of this kingdom of *England*: and this she is ready to verify: whereupon she prays judgment, and that the aforesaid *Luke* may be barred from having every execution whatsoever of and upon the recovery aforesaid, to be levied of the goods and chattels which were of the aforesaid *Robert* at the time of his death; and that she the said *Anne* may be restored to all things which she hath lost by occasion of the adjudication of execution aforesaid, &c.; and that the aforesaid *Luke* may come here in court to answer of and concerning the premises, &c. But because the court of the lord the king now here before the king himself doth not know whether the allegations of the aforesaid *Anne* in this behalf are true or not, therefore the sheriff of *Northumberland* is commanded that he cause the aforesaid *Luke* to come before the lord the king from the day of *Easter* in fifteen days, wheresoever, &c. to answer of and concerning the premises, and further to do and receive that which the court of the said lord the king now here before the king himself shall consider in this behalf. The same day is given to the aforesaid *Anne*, &c. At which day, before the lord the king at *Westminster*, cometh the aforesaid *Anne*, by her attorney aforesaid; and the aforesaid *Luke* at the same day, being solemnly required, likewise cometh, by *Henry Dodd* his attorney, and saith, that the matter in the writ and declaration aforesaid contained is not sufficient in law to compel the aforesaid *Luke* to answer to the same, or to retard the having his execution of and upon the judgment aforesaid to be levied of the goods and chattels which were of the aforesaid *Robert Lampton* at the time of his death, to which he the said *Luke* hath no necessity, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient writ and declaration in this behalf, he the said *Luke* prays judgment of the said writ and declaration, and that the said writ and declaration may be quashed, &c.

LAMPTON
against
COLLINS-
WOOD.

The plaintiff
was never sum-
moned.

Grovener.

Plaintiff prays
judgment.

And restitution.

Venue awarded
to summons
the plaintiff in
the *scire facias*.

Who appears
and demurs.

CRES. LEVINZ.

And the aforesaid *Anne* saith, that the writ and declaration aforesaid ought not to be quashed, because she saith, that the said writ and declaration, and the matters in them contained, are good and sufficient in law to bar the aforesaid *Luke* from having his execution of and upon the judgment aforesaid against her the said *Anne* to be levied of the goods and chattels which were of the aforesaid *Robert* at the time of his death, which said writ and declaration, and the matters in them contained, she the said *Anne* is ready to verify and prove as the Court, &c. And because the aforesaid

joinder in de-
murrer.

Michaelmas Term, 6. William & Mary, In B. R.

LAMPTON
against
COLLINGWOOD.

Curia advisare
vult.

Judgment for
the plaintiff,

and restitution
awarded.

aforesaid *Luke* doth not answer to the declaration aforesaid, nor hath hitherto in any manner denied it, she the said *Anne*, as before, prays judgment, and that the aforesaid *Luke* may be barred from having every execution whatsoever of and upon the recovery aforesaid, to be levied of the goods and chattels which were of the aforesaid *Robert* at the time of his death, &c. and that she may be restored to all things which she hath lost by occasion of the adjudication of execution aforesaid, &c. But because the court of the lord the king here is not yet advised of giving their judgment of and concerning the premises, day thereupon is given to the parties aforesaid before the lord the king, from the day of the *Holy Trinity* in three weeks, wheresoever, &c. for hearing their judgment of and concerning the premises, for that the court of the said lord the king here thereof are not, &c. At which day, before the lord the king at *Westminster*, the parties aforesaid come by their attornies aforesaid; whereupon all and singular the premises being seen and fully understood by the court of the lord the king now here, and mature deliberation being had thereupon, for that because it seems to the court of the said lord the king now here that the writ and declaration aforesaid, and the matter in them contained, are good and sufficient in law to bar the aforesaid *Luke* from having his execution of and upon the judgment aforesaid against the aforesaid *Anne*, to be levied of the goods and chattels which were of the aforesaid *Robert* at the time of his death; therefore it is considered, that the aforesaid *Luke* is barred from having every execution whatsoever of and upon the recovery aforesaid, to be levied of the goods and chattels which were of the aforesaid *Robert* at the time of his death, &c. and that she the said *Anne* is restored to all things which she hath lost by occasion of the adjudication of execution aforesaid, &c.

• [314]
Case 117.

* Lampton against Collingwood.

If judgment be obtained against two persons, and, after the death of both, the creditors bring a *scire facias* against the administrator of one of them, and after two *nibils* returned obtain judgment thereon by default, the administrator cannot afterwards bring

JUDGMENT was obtained against two persons who are both dead; the creditor brought a *scire facias* upon that judgment against the administratrix of one of them, and after two *nibils* returned judgment was awarded against her by default. Afterwards she brought a writ of error *coram vobis residen*. and the error in fact assigned was, that she was never summoned.

The question was, Whether this writ of error would lie or not? because the two *nibils* returned amount to a *scire feci*; and so there being a judgment by default after two *nibils*, it is too late now to bring a writ of error.

Some cases were cited to prove that error would lie after a judgment in *scire facias*, viz. where judgment was had against

a writ of error *coram vobis residen*. for the judgment being by default after notice it is too late.—
S. C. Salk. 262. S. C. Comb. 325. S. C. Carth. 282. S. C. 3. Salk. 145. S. C. Holt, 270.
S. C. 1. Ld. Ray. 27. Salk. 1075. 1. Bac. Abr. 196. 157. 2. Bac. Abr. 189.

the

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the bail upon *scire facias*, and yet they brought a writ of error, there being no *capias* against the principal; and, being error in process, it was held that the writ would lie (a). In *Michaelmas Term* in the forty-first year of *Queen Elizabeth*, the same error was assigned by the bail after judgment against them in a *scire facias* upon two *nibils* returned, as in the case at bar; and it was then objected, that a writ of error would not lie, not for the reason above-mentioned, but because such writ is given by the statute only to *the parties* in the action, and not to *the bail*; but it was held, that a suit upon a *scire facias* is in the nature of an action of debt, and a judgment in debt is particularly mentioned in the statute (b), and therefore a writ of error would lie (c). The like error was assigned in *Hilary Term* in the twelfth year of *Charles the First*; but there was also error assigned by the bail in the principal judgment, and being coupled with the error in the judgment on the *scire facias*, two Judges held the writ should abate (d), because the bail cannot have error for an error in the principal judgment; but it was agreed by all that it would lie upon the judgment on a *scire facias*. But the latter cases seem to be otherwise, viz. that a judgment upon two *nibils* returned, is a judgment by default after notice, and therefore a writ of error comes too late to reverse such judgment; this is the case of * *Barcock v. Thompson* reported by *Style* (e), and is mentioned also by my Lord *Rolle* (f), and agreed by him that such judgment is not erroneous:

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And upon the authority of this case the writ of error was now quashed (g).

AFTERWARDS the administratrix of *Lampton* brought an *audita querela*, suggesting also therein that she was never *summoned*, and that her husband died in the life-time of the other debtor, and so his estate was thereby discharged of the debt; and upon a demurrer it was debated:

An *audita querela* lies when the party has no other remedy.

FIRST, Whether an *audita querela* would lie where the party might have any other remedy? Now it is plain, that if the administratrix had not suffered judgment against her by default in the *scire facias*, she might have pleaded this matter; but by her neglect therein she cannot now have an *audita querela*.

BUT THE COURT were of a contrary opinion, upon the authority of *Barcock v. Thompson* above-mentioned, that the administratrix shall have an *audita querela*, because now she hath no other remedy.

(a) See 4. Leon. 24. pl. 76. and 36. pl. 99.

(b) 27. Eliz. c. 8.

(c) *Cockwaine v. Hawkins*, Cro. Eliz. 730.

(d) Cro. Car. 481.

(e) *Stiles*, 323.

(f) 1. Roll. Abr. 389.

(g) But see Anonymous, 1. Salk. 93.; *Wicket v. Cramer*, 1. Salk. 264.; *Wicket v. Foot*, 1. Ld. Ray. 439.; *Ludlow v. Leonard*, 2. Ld. Ray. 1295.; *Wharton v. Richardson*, Stra. 1075.; and *Dudley v. Stokes*, 2. Bl. Rep. 1183.

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SECONDLY, The question was, Whether the administratrix of the person first dying, shall be charged with the executors of the survivor?

3. Co. 14.
Yelv. 209.
Ray. 153.
Salk. 319.
8. Mod. 218.
242.
12. Mod. 130.
240. 494.
2. Bac. Abr.
359.
Ld. Ray. 244.
808. 850. 1073.

LEVINZ, *Serjeant*, argued, that both shall be charged, because where judgment was obtained against two in an *assize of novel disseisin*, and, upon a *scire facias* to have execution of the damages, the sheriff returned, that one was dead, and that he had summoned the survivor; it was held that he should not be compelled to plead, before the heir and tenants of the dead man were summoned (a). So where judgment was had against two in an action on the case, and a writ of error brought, and one died pending the writ, it was abated (b), because what was several before the judgment was thereby made joint, and the plaintiff in the judgment must have a *scire facias* against the executors of the dead man, who are now become charged with that judgment, and it shall not survive to the other alone.

But on the other side it was argued, that where the lands of several are charged with a debt, it shall not lie wholly upon the survivor; as if a recognizance be acknowledged by several, the lands of all are thereby become chargeable, and execution shall be equally made (c), and if one should die, the creditor must bring a *scire facias* against his heir and tenants (d); for they being all in *aquali jure*, the charge does not survive; but it is otherwise where * the lands are not bound by judgment; as if two enter into a bond, and one dies before judgment, the survivor shall be charged alone (e).

* [316]

And JUDGMENT was given accordingly.

- (a) Fitz. Abr. "Execution" pl. 81. (d) 1. Lev. 30. Raym. 28.
(b) Yelv. 208, 209. (e) 1. Sid. 238.
(c) Sir Wm. Herbert's Case, 3. Co. 12.

Case 118.

Moor against Parker.

Michaelmas Term, 4. Will. & Mary, Roll 268.

A father seises his estate upon his son for life, remainder to his first and other sons in tail male, reversion to himself in fee; and devises that if his wife die in

ASSUMPSIT upon a wager, being a *feigned issue* directed by the *House of Peers*. The case upon a special verdict found was thus:

George Chute the father being seised of the lands in question, made a settlement thereof to *George* his son for life, remainder to his first, &c. son in tail male, reversion in fee to *George* the father, who in June 1683 made his will as follows: "As TOUCH- the life-time of her husband, without issue male, he shall have power to make a jointure to any other wife, and for want of issue male of his said son, the estate shall remain to his son by any other wife, and his grand daughter shall have 400*l*. and in case of failure of issue male by his son, the estate shall go to his grandchildren and their heirs, share and share alike. This devise does not convey an estate tail to his son.—3. C. 1. Eq. Abr. 182. 3. C. 1. Ld Ray. 37. 3. C. Skin. 558. Skin. 339. 1. Vent. 129. 2. Verr. 388. 2. Leon. 129. Cro. Eliz. 52. 9. Mod. 261. 1. Salk. 224. 3. Lev. 434. 3. Com. Dig. "Devise" (N. 7.). Dougl. 492. 2. Bac. Abr. 61.

"INT"

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"ING my lands and tenements, &c. my will is, that if my son's wife die during the life of her husband without issue male; that then he shall have power to make a jointure to any other wife, and for want of issue male of his said son; then the lands shall be and remain to his son by any other wife, and his grand-daughter shall have four thousand pounds; and in case of failure of issue male by his son George, then all his lands shall go to his grandchildren and their heirs, share and share alike." George the father died; his son survived and suffered a common recovery, and died without issue male.

Moore
against
PARKER.

The question was, Whether those who claimed under the recovery, or the grandchildren of the testator, had the better title; that is, whether George the son had only an *estate for life* or an *estate in tail*?

LEVINZ, *Serjeant*, argued, that the son had an *estate tail*, and that by the recovery the estate to the grand-daughters was barred; that it was an estate tail by implication, and it could not be otherwise, because the son could not have a fee-simple, for that was devised to the grand-daughters upon his dying without issue male, and therefore not having the fee, he must of necessity have the estate tail in the mean time by the last clause of the will. There is nothing devised to him by express words, but by implication; and it is no new thing that an estate tail should arise by implication, especially in a will; as for example: * In *Michaelmas Term* in the ninth year of *James the First*, the case upon a special verdict was (a), *William Brown* had issue *John* and two daughters, and he had likewise two nephews, *Matthew* and *Henry*, and having lands in several places, he devised all to his son and his heirs; and if he died without issue, then he gave his land in one place to *Matthew* in fee; "ITEM, I devise my land in *White-acre* to *Henry* and his heirs;" and it was adjudged, that this was a limitation by way of remainder to *Henry*, and that the words shall be construed thus, viz. that *Henry* shall have the fee, if *John* die without issue. Now though there was an express devise of the fee in that case, which is not in the case at bar, to the son, yet that will make no alteration, because the son would have been entitled to a fee simple by descent had it not been for the will. So in *Trinity Term* in the fourteenth year of *James the First*, the case was (b), A man had a wife, one son, and two daughters, and devised his house in *London* to his son after the decease of his mother, "and if his three sisters survive their brother and his heirs," that then they shall have it for their lives, remainder over, &c. and it was held, that the son had an estate tail, because the word "heirs" there shall be intended heirs of his body, otherwise the limitation to the sisters would be void, because then a fee would be limited upon a fee, which is against the rules of law: now in this case there was no express devise of any estate

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(a) *Brown v. Jervies*, Cio. Jac. 290.

S. C. 2. Yelv. 209.

(b) *Webb v. Harting*, Cro. Jac. 415.

S. C. 2. Roll. Rep. 398. 436. S. C.

Bridg. 24. S. C. Moor, 853. S. C.

1. Roll. Abr. 835. 843.

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to the son, and yet it was adjudged that he had an estate tail by implication. It is true, in the case of *Pell v. Brown* (a), there is a contrary resolution; that was a devise to *Thomas* his youngest son and his heirs, and if he died without issue living *William* his eldest brother, that then he should have it in fee; and this was adjudged an estate in fee in *Thomas* and no tail; the reason given was, because *William* had only a possibility of having it, for it was not devised to him absolutely, viz. if *Thomas* died without issue; but upon a contingency, viz. his dying without issue living *William*.

THE SERJEANT did not answer this case, only said, that he had heard very learned Judges affirm that it was a very hard case.

Then he argued, that if the daughters had any title, it must be by way of *contingent remainder* or of an *executory devise*. It cannot be the one, because the son had no estate of freehold to support such remainder; * neither can it be the other, because an *executory devise* is never to arise upon failure of issue male generally, or without issue indefinitely, and in this case there is an estate tail, which may last many generations.

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SIR BARTHOLOMEW SHOWER, *contra*.—By the settlement *George* the son had but an *estate for life*, and he shall not have an *estate tail* by implication by this will, because the design of it was only to enable him to make a jointure to any other wife, and to provide for her children, but not to enlarge his estate. The words which seem to create an estate tail are, “and for want of “issue, &c.” but the law is otherwise, because there is no express estate given to him by the will before those words: It is like the case in *Michaelmas Term* 10. *Jac.* where a man devised an estate to his eldest son for life, remainder to the sons of his body lawfully begotten, and if they alien, &c. that then his daughters shall have the land, remainder to his right heirs; and it was held that the words “sons of his body” and “first son, &c.” are words of purchase (b). Neither can the words “in case of failure of issue “male, &c.” create an estate tail (c), because those were added to explain what was generally and uncertainly expressed before. In *Michaelmas Term* in the first of *Elizabeth*, *Clement Frensham* (d) devised lands to his wife for life, remainder to his cousin, and the heirs male of his body; and if his cousin die without issue of his body (but doth not say *issue male*) remainder over in fee; the cousin had issue a daughter only, and died; and it was adjudged, that he should not have the land by these general words; it was not an

(a) Cro. Jac. 590. S. C. 1. Roll. Abr. 835.

(b) 1. Roll. Abr. 837. pl. 13.

(c) See *Allanfon v. Chibero*, 1. Vezey, 24.; *Lethicullier v. Tracy*, 3. Atk. 794.; *Robinson v. Robinson*, 1. Burr. 44.; *Barnfield v. Popham*, 1. Peer Wms. 54.; *Evans v. Aitley*, 3. Burr. 1570.

(d) *Tuck v. Frensham*, Moor, 13. S. C. Dyce, 171. a. S. C. 1. And. 8. S. C. Guedb. 16. S. C. Bendl. pl. 114. See also *Friend v. Boucher*, 3. Mod. 81. Pollenz. 657. 1. Peer Wms. 54.; *Goodright v. Cornish*, 1. Salk. 226.; *Popham v. Barnfield*, 1. Salk. 230. 2. Vern. 450. 546. 1. Com. Dig. “Devise” (N. 6.).

estate

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estate tail to him and the heirs of his body in general, but to him and the heirs male of his body, for the will took effect by the first words, which are a guide to those which follow. And there is no more reason why these general words in the case at bar should give an estate tail by implication to *George Chute* the son, there being no particular estate devised to him before, than there was in the case abovementioned, why the general words in that case did not make any such estate (a). There is another case to this purpose (b); it was a copyholder in fee, who made a surrender to the use of his will, and then devised to his wife, and if she had issue by him, then to the issue, &c. and if such issue die before age, or before his wife, "or if she have no issue, then, &c.;" and it was held, that she had but an estate for life, and could not dispose of the lands to her children. And according to these resolutions have late cases been adjudged; as, where a woman had two sons by two husbands, and devised to *Thomas* her eldest son for life, and to his issue in tail, and if he died without issue then living, to her second son in fee; but if he die having issue of his body then living, then to him in fee; and it was held (c), that though the reversion descended to him as heir, yet by the limitation of the will he had but an estate for life, which is like the present case, viz. a good contingent remainder to commence upon his dying without issue male.

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CURIA. It will be impossible to make this an estate tail by tacking the estate, by the will, to the estate for life in the settlement, on purpose to support the contingent remainder; because the settlement and will are two distinct conveyances.

And therefore judgment was given that this was not an estate tail.

- (a) See Attorney General v. Suilar, See also 1. Brown's Cases in Chan. 439.
1. Peer Wms. 754. ; Vaughan v. Faner, 2. Bac. Abr. 60.
2. Vez-y. 182. (c) Plunket v. Holmes, 1. Sid. 47.
(b) Beal v. Shepherd, Cro. Jac. 199.

Warrington against Mosely.

Case 119.

Hilary Term, 6. Will. & Mary, Roll 291.

ERROR OF A JUDGMENT in the county-palatine of Chesh- A prescription, generally, toll of all goods brought within the limits of a certain manor is bad; for every prescription to charge the sub-

ter. The plaintiff prescribed for toll of goods bought within a manor.

The question upon the pleadings was, Whether such a toll, independent of all markets and fairs, can be good?

ject with a duty, must impart a benefit, or shew a reason why it is claimed.—S. C. Comb. 295. S. C. Holt, 673. Moor, 575. 3. Lev. 38. 2. Jenk. 118. 1. Mod. 231. 2. Mod. 244. 10. Mod. 260. Wilf. 293. Ld. Ray. 385. Stra. 1171. 1228. 3. Burr. 1404. Cowp. 47. 1. Term Rep. 667. 6. Com. Dig. "Toll" (C.). 2. Bac. Abr. 457. 3. Bac. Abr. 49.

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It was argued that the prescription was unreasonable.

FIRST, For the manner, viz. the lord only claims the toll in his manor, and it is not for goods bought or sold in a market, &c.

SECONDLY, For the matter, viz. he prescribes to toll of twopence for every pack bought in Manchester called Manchester wares, except of the burgeses there.

All toll must arise by prescription or grant, the one supposes the other; now the lord of a manor cannot have toll by prescription (a), because at the common law there was no custom paid but for wool, woofels, and leather, * which was therefore called *antique five magna custuma*, and all other tolls are esteemed *male tolmeta* (b). Neither can he be entitled to this by any grant from the king, because he cannot charge his people with any thing but what is for the public good, without their assent in parliament, and therefore the writ of *ad quod damnum* is directed to the *eschecator* to enquire what damage it would be to the king or any of his subjects, if he should grant to B. that he may make an assignment of certain lands to a chaplain for ever to pray for his soul in a certain church (c), for by reason of such assignment the land would be exempted from several duties, as fines, amerciaments, &c. *ita quod patria per donationem et assignationem præd. magis solito non oneretur seu gravetur*. Now if the king cannot impose a duty upon his subjects but such which is for their benefit, à fortiori a lord of a manor cannot; and to this purpose there is an express authority in *Easter Term 11. Car.* (d) There was an information against *Morgan* for levying twopence for every barrel landed at *Cockernepill*, though it was his own land, and the parties could not sell there without his assent; yet this being to levy a new toll, it was held unlawful; he might make a particular agreement with the people, but he could not exact a toll (e). This toll is in nature of *toll-through*, for which there can be no prescription (f), because it is lawful for any man to pass by or through the highway; so it is as lawful for any man to buy goods brought to his shop (g). If the plaintiff had any right to this duty, he should have shewed that the people had some benefit by selling their goods in this place; as where a man justifies in trespass, and prescribes to have a toll for beasts driven over such a manor, it is a void prescription, being for *toll-through*, unless the party who claims the duty shews that the subject has some advantage (h). So where a man alleges a custom to have so much a ton for all goods passing on a river by such a wharf, this is a *toll-through* which the law calls *malum tolmetum*, unless

(a) 2. Inst. 59. Vaugh. 162.

(b)

(c) Fitz. N. B. 222. 2.

(d) 2. Roll. Abr. 171.

(e) 22. Affize pl. 58.

(f) Bro. Abr. "Prescription" pl. 88.

Bro. Abr. "Toll" pl. 6. But see the case of *Smith v. Shepherd*, Cro. Eliz.

710. contra. 2. Roll. Abr. 522.

(g) 2. Inst. 220.

(h) *James v. Johnson*, 1. Mod. 231.

S. C. 2. Mod. 143. *Crispe v. Sal-*

wood, 3 Lev. 424. *Halspurt v. Wills*,

1. Mod. 48. S. C. 1. Vent. 71. *Col-*

lier v. Smith, Cowp. 47. *Lord Pel-*

ham v. Pickersgill, 1. Term Rep. 666.

the

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the plaintiff shew that the river was usually cleaned by him, or that he repaired the banks, or that he has done some good for this duty (a). Nay, it has been held, that a tax cannot be imposed on the subject but by parliament, though it is for their benefit (b).—* But admitting that the plaintiff may prescribe for toll of goods bought within this place, yet such a general prescription is not good to bind strangers, no more than a prescription to have a heriot of every stranger dying within such a manor, which is void (c), because it cannot have a reasonable commencement between the lord and a stranger, though it may between him and his tenants. So a prescription to have a heriot, viz. the best beast of his tenant, and if it be eloiigned before the lord seizes it, that then he may take the beast of any other person *levant et couchant* upon the land; this is a void and an unreasonable prescription (d).

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against
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* [321]

8. Mod. 297.
2. Ld. Ray.
1558.

SECONDLY, This is not good by reason of the uncertainty of the thing out of which the duty arises; for it is *de quolibet sarcinâ*, not saying of what it consists: now if the Court must judge whether twopence be a reasonable duty or not, they must know what is in the pack; and what a customary pack of *Manchester wares* is, will be difficult to be known in WESTMINSTER-HALL. To instance in parallel cases, many *indictments* and *informations* have been quashed for such uncertainties, viz. An information for engrossing *diversos cumulos tritici* was held void, because of the uncertainty of the quantity in each heap, though the value of the whole was particularly set forth (e). So an indictment for engrossing *magnam quantitatem straminis et fœni* was quashed for the like reason (f). Likewise in trover and conversion *pro duobus garbis*, ANGLICE "sheaves of corn," the declaration was held ill (g), because the plaintiff had not shewed what corn it was, and the *Anglice* being void, then it was only trover *de duobus garbis*, which word in its latitude comprehends any thing which may be tied up in bundles (h).

Ld. Ray. 765.

8. Mod. 58 296.
328.

Fitzg. 47. 56.

122. 263.

3. Peer Wms.

433. 496.

Ante, 256.

Str. 2. 8. 849.

866. 900. 999.

1246.

Ld. Ray. 191.

277. 284. 452.

1179. 1184.

This prescription is also void by reason of the persons of whom it is demanded, viz. of all people bringing wares thither to be sold, &c. so that neither the king himself nor his purveyors are excepted; it is contrary also to MAGNA CHARTA (i), which enacts, "that all merchants may buy and sell without any manner of evil tolls."

It is void likewise by reason of the time demanded, viz. immediately upon the sale of each pack of wares: now no toll is due before the sale, unless by custom time out of mind (k), and here is no consideration laid why the lord should have such a duty.

(a) 1. Sid. 454.

(b) 1. Sid. 218.

(c) Cro. Eliz. 725. Dyer, 71. in m. rg. See also 3. Com. Dig. "Copyhold" (K. 24.)

(d) Dyer, 179. b. 2. Brownl. 90. Moor, 16. Bendl. pl. 147. 294. 1. Cam. Dig. "Copyhold" (K. 25.).

3. Bac. Abr. 48. 49.

(e) 1. Roll. Abr. 134.

(f) Anonymous, Cro. Car. 381.—

See also 2. Hawk. P. C. c. 25. l. 74.

(g) March, 60.

(h) Allen, 80.

(i) Cap. 30.

(k) 2. Inst. 220.

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* IT WAS ARGUED *on the other side*, that time and usage were the foundations both of *prescriptions* and *customs*; and if customs were not unreasonable, it was not necessary to shew their commencement.

As to the generality alledged against this prescription, it is not void for that reason, for such general prescriptions to have toll of all people, have been warranted by several precedents. In the tenth year of *James the First* the issue in a *quo warranta* was, Whether the defendant had toll of all people within the manor of *Petworth*, in the county of *Sussex*, as well of the tenants of the *Earl of Arundel* as of strangers? and the issue was found for him (a). Nothing is more common, in our Books, than for a lord of a manor to prescribe for a duty within the same, though it is to the prejudice of particular people (b), because such customs may have a reasonable commencement; and therefore it has been held good for a lord, &c. to prescribe that the bread for all the inhabitants in his manor and passengers there should be baked at his oven, and that no other person time out of mind, &c. had used a bakehouse there without his appointment, &c. (c). It is for this purpose that the writ *de secta ad molendinum* lies (d), and in the *Register* (e) there is a prescription alledged *ratione domini*, which is a very extraordinary claim, and goes farther than what was made by the lord of a manor. In 8. *Edw. 3. pl. 37. b.* the defendants justified in trespass for the pulling down of a fold, as servants to the lady of the manor of *Hastings*, who, by reason of her feignory, had a freehold throughout the said vill, so that no other could fold there without her leave; this extends as well to strangers as to those of that vill, and yet it was held good. So in 21. *Hen. 7. pl. 16. a.* the mayor and commonalty of *Gloucester* prescribed to have toll of every boat which passed by their city, &c. and this was adjudged a good prescription (f), although no reason is given why they should have that toll. Many other cases might be cited wherein the law was held to be the same; as in 18. *Eliz. (g)* the *Lord Mayor of London* brought an action on the case, grounded upon a custom to have the twentieth part of the salt of every stranger who brought it to the port of *London*, and there is no reason alledged why he should have that part, and yet the mayor had judgment. * In an action on the case (h) the defendant justified the taking of the goods, for that the bailiff of *Yarmouth* had used to have toll of the tenants and inhabitants of *Lestoff* for any of their goods brought thither by sea to be sold; and upon a demurrer he had judgment; though it was upon a general claim of toll for all their goods brought thither, without saying to the port (i). So in trespass (k) the defendant prescribed to have two-

(a) 1. *Ballst. 195.*

(b) 1. *Koll. Abr. 559.*

(c) Sir George Fermor v. Brooke,
8 Co. 315. Cro. Eliz. 203. 1. Leon.
pl. 195.

(d) Fitz. N. B. 153.

(e) M. Reg. 105. b.

(f) Cro. Eliz. 710. Bro. Abr.

"Prescription" pl. 92.

(g) Dyer, 352. b.

(h) Cro. Eliz. 227.

(i) 1. Leon. 231.

(k) Cro. Eliz. 711.

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pence for every score of sheep, of strangers, brought or driven *per et trans villam de MELTON MOWBRAY*, and if that toll was denied, to distrain for it; now though this was a *toll-thorough*, for which a prescription cannot be alledged without shewing some cause, that it may appear to have a reasonable commencement (a), yet the plea was held good by the opinion of two Justices against POPHAM, *Justice*, viz. that such a toll might be claimed generally; for it being by prescription, it cannot be intended that the cause should be known why it began. The person who gathers the toll is a standing witness of the alteration of the property, and of the fairness of the contract.

WARRINGTON
against
MOSELY.

Then as to the other objection, that it is unreasonable for the incertainty; it is a customary claim for a certain thing in a certain place, and the custom has fixed what is meant there by the word *farcina*; it is as certain as a duty for a piece of cloth in the Book of Rates (b); and it is as certain as a prescription to have a half-penny for every porter's burden laid upon *Queenhithe* to be conveyed from thence by water, which has been held good (c); and it is very well known that a strong porter will carry more goods than another.

THE COURT was not satisfied with this prescription, because there was no recompence for it, and every prescription to charge the subject with a duty, must impart a benefit or recompence to him, or else some reason must be shewed why a duty is claimed. The case in *Dyer* (d) seems to be very hard, for the lord mayor to have the twentieth part of all salt brought to London, and no reason given why he should have it. But as for the case of *foldage*, it was upon the lands held of the manor of *Hastings*, whereof the tenants had the feedings, and that may have a reasonable commencement.

(a) 1. Mod. 48. 105. 232.

(b) Hob. 85.

(c) Moor, fo. 825. pl. 1114.

(d) Dyer, 352.

* Hicks against Woodeson.

* [324]
Case 120.

SOMERSETSHIRE, } NICHOLAS HICKS, who sues as well
to wit. } for the lord the king and lady the queen
as for himself in this behalf, complains of *Samuel Woodeson*, clerk,
rector of the parish church of *Huntspill*, in the county of *Somerset*
aforesaid, in the custody of the marshal of the *Marshalsea* of the
lord the king and lady the queen, being before the king and queen
themselves, of a plea wherefore he sued in the court christian against
the royal prohibition to him before directed and delivered to the
contrary thereof, for that (to wit), That whereas the parish of
Huntspill, in the county aforesaid, is an ancient parish, and whereas
the said *Nicholas*, for the space of five years now last past, and
more, hath been, and as yet is, an inhabitant within the parish
aforesaid, and for the whole time aforesaid hath had and occupied

Prohibition to
the spiritual
court as to
tithes.

S. C. 3. Ld.
Ray. 116.

The plaintiff an
inhabitant and
landholder in
the parish.

forty

Michaelmas Term, 6. William & Mary, In B. R.

Hicks
against
WOODRISON.
A modus decimandi set forth,
for lambs,
milch cows,
and calves,
and colts,
and hay,
and gardens or
orchards,
and offerings.
The modus set forth.

forty acres of land, meadow and pasture, with the appurtenances, being parcel of the manor of *Huntspill*, in the said county of *Somerset*, within the parish aforesaid, and the bounds, limits, and titheable places of the same parish. And also whereas there are had, and from time whereof the memory of man is not to the contrary there have been had, within the same parish, and the bounds, limits, and titheable places of the said parish, these customs and modus's of tithing, of and concerning the tithes of lambs following, brought forth and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of milch cows and heifers kept and depastured within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of calves falling, brought forth and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of colts falling, brought forth and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of hay growing, renewing and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of gardens and orchards, being within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the payment of the offerings of all the men and their wives inhabiting within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; that is to say, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who hath in any year kept any milch cow * or heifer, or any milch cows or heifers, within the parish aforesaid, and the bounds, limits, and titheable places thereof, hath paid, and for all the time aforesaid hath been used and accustomed to pay, to the rector of the parish-church of *Huntspill* aforesaid, or to his farmer or deputy of the rectory for the time being, for every such milch cow three pence, of lawful money of *England*, and for every such milch heifer one penny and an halfpenny, of like lawful money, in every such year, and no more, for all the tithes of milk of the same cows and heifers in the same year; and that every such occupier as aforesaid, who in any year hath had any lamb or any lambs under the number of seven lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, hath paid, and for all the time above said hath been used and accustomed to pay, to the rector of the parish-church of *Huntspill* aforesaid, or to his farmer or deputy of that rectory for the time being, in the same year, one halfpenny, of the like lawful money, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content, of all tithes of those lambs: but if the same occupier in any such year hath had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming,

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coming, then the same occupier hath rendered and delivered, and for all the time above said hath been used and accustomed to render and deliver to the rector of the parish-church of *Huntspill* afore said, or to his farmer or deputy of that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs; and for the number of seventeen lambs, two lambs; and for every calf one halfpenny, if less than seven calves, and if above seven, then one calf, and two calves for seventeen calves; and one penny for every colt; and two pence for every acre of hay; and two pence for every garden and orchard; and for every man of the age of sixteen years two pence, and for a wife two pence, for oblations. And also whereas the hundred of *Huntspill* and *Puriton*, within the afore said county of *Somerset*, is, and from time whereof the memory of man is not to the contrary hath been, an ancient * hundred, within which said hundred the said parish of *Huntspill* is, and from time whereof the memory of man is not to the contrary hath been. And whereas within the same hundred of *Huntspill* and *Puriton* there is, and for all the time above said there hath been, a certain ancient custom for all the time above said used and approved, that all the inhabitants within the hundred afore said, occupying any lands, meadow or pasture, within the hundred afore said, have been free, exempt, and discharged, and from time to time, for all the time above said, ought to be free, exempt, and discharged, of and from the payment of any tithes of or for the depasturing of any cattle not employed to plough or pail, by them depastured in any lands, meadow or pasture, being within the hundred of *Huntspill* and *Puriton* afore said, to wit, at the hundred afore said. And whereas the said *Nicholas*, for the space of seven years next before the exhibiting the bill of the said *Nicholas* in the court here, hath been, and as yet is, an inhabitant within the hundred afore said, and within the said parish of *Huntspill*, and for all the same time of seven years afore said did possess and occupy divers lands, meadow and pasture, within the hundred and parish afore said, and hath depastured upon the same lands, meadow, and pastures, and not elsewhere, within the same time, divers cattle not employed to plough or pail, that is to say, cows, heifers, and colts; nevertheless the said *Samuel*, well knowing the premises, yet contriving and maliciously intending unjustly to aggrieve and oppress him the said *Nicholas*, against the due form of law, and against the form and effect of the said modus's of tithing, and the custom afore said, and unjustly to violate the customs and prescriptions of those modus's of tithing, and also to disherit the said lord the now king and lady the now queen, and their crown, and to draw the conscience of a plea which belongs and appertains to the said lord the king and lady the queen, their royal crown and dignity, to another trial, hath drawn him the said *Nicholas* into plea, before the venerable man *Richard Hely*, doctor of laws, surrogate of the venerable man *Edwin Sandys*, clerk, archdeacon of the archdeaconry of *Wells*, lawfully constituted surrogate, or the law-ful

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against
WOODSON.

Ancient hun-
dred.

[326]

Custom for the
inhabitants
within a hun-
dred to be dis-
charged of tithes
of meadow and
pasture for bar-
ren cattle.

Custom in some
decimando for all
cattle not em-
ployed to the
pail or plough.

he plaintiff an
inhabitant and
landholder with-
in the hundred,
and fed cattle
there;

yet the defend-
ant, knowing
the premises, &c.

drawn to plead
before the eccle-
siastical judge,

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Hicks
against
Woodeson.
for non pay-
ment of tithes.

* [327]

The libel.

ful deputy of the said archdeaconry, or some other competent judge in this behalf, of and for the subtraction and non-payment of the tithes of lambs fallen, brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, in the years of our Lord 1689, 1690, &c. and also in the months of *March, April, May, and June*, in the year of our Lord 1693, now current, or in every one or some of the same months * and years ; and of and for the subtraction and non-payment of the tithes of calves within the parish aforesaid, and the bounds, limits, and titheable places thereof (so for colts, cows, heifers, hay, gardens, and orchards, *mutatis mutandis*) ; and of and for the subtraction and non-payment of offerings of all the men and their wives inhabiting within the said parish, and the bounds, limits, and titheable places thereof, in the years and months aforesaid, or in every one or some of them, by craftily and subtilly libelling in the same court christian against the said *Nicholas Hicks*, in and by a certain libel and a certain schedule to the same libel subscribed or annexed, against him the said *Nicholas Hicks* in the said court christian exhibited, under the form following, that is to say, “ First of all, “ That the said *Master Samuel Woodeson*, in the years of our Lord “ 1689, 1690, &c. to wit, in the months past in the same respec- “ tively concurring, and also in the months of *March, April, &c.* “ in the year of our Lord 1693 now current, or in every one or “ some of the said months and years, hath been and was rector of “ the parish-church of *Huntspill* aforesaid, and of all and singular “ the tithes, ecclesiastical rights, and emoluments, to the same “ rectory belonging and appertaining, and the said rectory, with “ all its rights, members, and appurtenances, rightly, lawfully, &c. “ canonically hath got and obtained, and the same so obtained, “ with all its rights and appurtenances, hath possessed and had, “ as he hath at this present time (except as within written), and “ for the true rector and lawful possessor of the same hath been for “ the time aforesaid, and also at present is commonly called, held, “ esteemed, named, and reputed, openly, publicly, and notoriously ; “ he propoundeth nevertheless, &c. And he propoundeth jointly “ and severally of every item, which as well of common right of “ this renowned kingdom of *England*, as from antient and laudable “ and lawful prescriptive custom, from time and through time, the “ beginning whereof the memory of man is not to the contrary, “ hitherto hath been inviolably and unshakenly used and observed, “ and against gainfayers hath often obtained in judgment, or at least “ once the right of perceiving, receiving, and having, all and sin- “ gular the tithes, as well greater as lesser, mixed and minute, “ whatsoever, and the rest of the rights and emoluments of the “ church whatsoever in the schedule to these presents annexed, “ contained, and specified, within the parish of *Huntspill* afore- “ said, and the bounds, limits, and titheable places of the same, “ wheresoever, whensoever, howsoever, and as often as forth- “ coming, growing, renewing, and happening, to any rector there “ whatsoever * for the time being, or his farmers, and to the said “ *Master*

* [328]

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Woodson.

" *Master Samuel Woodson*, clerk, the present rector there, hath
 " belonged and appertained, doth belong and appertain, ought to
 " belong and appertain, and doth and shall appertain and belong ;
 " and propoundeth as above. Also, that for ten, twenty, thirty,
 " forty, fifty, and sixty years last past, more or less, and also from
 " time and through time, the beginning whereof the memory of
 " man is not to the contrary, the rector of the said rectory of
 " the parish-church of *Huntspill* aforesaid, for their respective
 " times successively being, and the said *Master Samuel Woodson*,
 " clerk, the present rector there, or his predecessors, and all and
 " every of his predecessors in successive times in the same being,
 " in the same have been, as they ought to have been, in the quiet
 " and peaceable possession, or as of right to perceive and have all
 " and singular the tithes aforesaid, and have received and had them
 " by themselves, or their predecessors, and of and upon the same
 " have freely and fully disposed, and so it hath been and ought to
 " be, and so the said *Master Samuel Woodson*, clerk, the rector
 " aforesaid, hath perceived, received, and had for the whole, and all
 " the time of his incumbency in the same, in right, and in the name
 " of his rectory, until and unto the time of the grass within
 " written ; and he propoundeth as above. Also the said
 " *Nicholas Hicks*, in the years and months aforesaid, or in one
 " or some of them, all and singular the titheable things, fruits,
 " rights, and emoluments, in the present schedule annexed, con-
 " tained, and specified, within the parish of *Huntspill* aforesaid,
 " and the bounds, limits, and titheable places thereof, forthcoming,
 " growing, renewing, and happening, as in the same schedule is
 " declared, and they are drawn out (which said schedule the party
 " propounding will have to be accounted as if here inserted and
 " read, as far as it may be expedient for him, and not otherwise,
 " or in any other manner), hath had, holden, possessed, received,
 " and to his own proper use converted and applied ; and the party
 " proponent propounded of every other number of things respec-
 " tively titheable, and of the tithes in the schedule to these presents
 " as above set forth annexed respectively contained and specified,
 " more or less, and also such and such number, quality, and quan-
 " tity, as by lawful proofs or confession of the party in the event
 " of this suit more fully shall come to be proved ; and he pro-
 " poundeth as above. Also, that the true value or estimate of
 " every titheable thing and things respectively titheable in the
 " schedule aforesaid to these presents as before is set forth an-
 " nexed, contained, and specified, as of the tithes or tenth
 " part thereof to the sums or respective values in the same
 " schedule mentioned, in the months and years aforesaid, or
 " in one or some of them, in the common * estimation of men * [329]
 " manifestly did extend, and do extend ; and the party proponent
 " propoundeth of every other sum or value of the things respec-
 " tively titheable, and of the tithes, more or less, and also of such
 " and so much money or value, quality, and quantity, as by law-
 " ful proofs in the event of this suit more fully shall come to be
 " proved ;

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against
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“ proved ; and he propoundeth as above. Also, that the said
 “ *Nicholas Hicks* to pay, give, and deliver, to the before-named
 “ *Samuel Woodeson*, the rector aforesaid, or to his lawful deputy in
 “ this behalf, all and singular the tithes aforesaid, so as before set
 “ forth, accustomed to be paid, and especially the tithes and eccle-
 “ siastical rights and emoluments aforesaid, in the schedule to
 “ these presents (so as before is set forth) annexed, mentioned,
 “ and specified, or otherwise, to compound duly with the said
 “ rector for the same, or with his lawful deputy, hath oftentimes;
 “ at least once, been properly and lawfully requested and impor-
 “ tuned, who being so requested and importuned did not take care
 “ to do the premises, or any of them, nor at present doth take any
 “ care, but hath with-holden and refuseth to pay, but at least (more
 “ properly) with-holds and defers at present, to the great peril of
 “ his soul, and no small prejudice and grievance of the said *Master*
 “ *Samuel Woodeson*, the rector aforesaid ; and he propoundeth as
 “ above. Also, that the said *Nicholas Hicks* hath been, and is, an
 “ inhabitant of the said parish of *Huntspill*, manifestly under and
 “ subject to the diocese and jurisdiction of *Bath and Wells* ; and
 “ he propoundeth as above. Also, that all and singular the pre-
 “ mises were and are true, notorious, public, manifest, and in like
 “ manner famous, and the public voice and fame have laboured of
 “ and concerning the same, as at present they labour ; whereupon,
 “ having given the assurance required by law in this behalf, the
 “ party of the said *Master Samuel Woodeson*, the rector aforesaid,
 “ prays right and justice, and his complement thereof to be done
 “ and administered to him with effect, &c.” In which said sche-
 “ dule annexed to the said libel as aforesaid are contained the words
 “ following (that is to say) : “ First of all, that in the years and months
 “ aforesaid, all, some or one of them, upon the tenements, estate,
 “ and lands, which he the said *Nicholas Hicks* had held, possessed,
 “ and enjoyed, in the said parish of *Huntspill*, and titheable places
 “ thereof, there was kept feeding and depasturing twenty ewe
 “ sheep, and of them there was yearly fallen twenty lambs, each
 “ lamb worth three shillings, and the tithe after that rate. Also,
 “ that the said *Nicholas Hicks*, in the months and years aforesaid,
 “ all, some, or one of them, within the said parish of *Huntspill*,
 “ and titheable places thereof, had and kept feeding and depastur-
 “ ing yearly four cows and four heifers, and for the milk of each
 “ cow he is to pay three pence, * and of every heifer three half-
 “ pence, according to the custom of the said parish. Also, that
 “ the said *Nicholas Hicks* of the said cows and heifers above-men-
 “ tioned had fallen yearly six calves, which he bred up for the pail,
 “ for each he is to pay one halfpenny, according to the custom of
 “ the said parish. Also, that the said *Nicholas Hicks*, the months
 “ and years aforesaid, all, some, or one of them, within the parish
 “ of *Huntspill*, and titheable places thereof, had held and possessed
 “ twenty acres of meadow, which he mowed, or caused to be
 “ mowed, yearly, for each acre of which there is yearly due, and
 “ he ought to pay to the rector of *Huntspill* aforesaid, for and in
 “ lieu

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" lieu of tithe-hay, two pence, according to the custom of the said
 " parish. Also, that the said *Nicholas Hicks*, the months and
 " years aforesaid, all, some, or one of them, within the said parish of
 " *Huntspill* aforesaid, had and possessed one garden and two
 " orchards yearly, for which there is yearly due, and he ought to
 " pay to the rector of *Huntspill* aforesaid, three pence, according
 " to the custom of the said parish, to wit, one penny for his garden
 " and each orchard. Also, that the said *Nicholas Hicks*, the months
 " and years aforesaid, all, some, or one of them, within the parish
 " of *Huntspill* and titheable places thereof, had and kept feeding
 " and depasturing the colts above one year old, which he sold
 " away before they were used to the plough, the feeding and
 " depasturing of each colt, the months and years aforesaid,
 " being monthly worth four shillings, and the tithe after that rate,
 " and also had and kept feeding and depasturing, the months and
 " years aforesaid, all, some, or one of them, in the said parish, ten
 " cows, ten heifers, ten steers, and ten oxen, from the time he
 " bought them to the time he sold them off they were never em-
 " ployed to the plough or pail, the herbage and depasturing of
 " each of the said cows, heifers, steers, and oxen, being monthly
 " worth four shillings, and the tithes after that rate. Also, that
 " the said *Nicholas Hicks*, the months and years aforesaid, all,
 " some, or one of them, in the said parish of *Huntspill* and tithe-
 " able places thereof, had and kept four mares, and of them had
 " fallen and received four colts yearly, for the fall of each he is and
 " ought to pay to the rector of *Huntspill* aforesaid one penny,
 " according to the custom of the said parish. Also, that the said
 " *Nicholas Hicks* * hath, the months aforesaid, all, some, or one of * [331]
 " them, dwelt in the said parish of *Huntspill*, and he and his wife
 " have received, or at least ought to have received, the holy sa-
 " crament of the Lord's Supper at their own parish church, for
 " whose offerings he is yearly to pay to the rector at *Easter*, or
 " thereabouts, four pence yearly, to wit, two pence for each.
 " Also, that the said *Nicholas Hicks*, the months and years aforesaid, all, some, or one of them, within the said parish and tithe-
 " able places thereof, had kept and bred up forty head of cattle,
 " which he sold before they came to the plough or pail, the herb-
 " age and depasturing of each of the same being monthly worth
 " forty shillings, and the tithe after that rate. Also, that the said
 " *Nicholas Hicks*, the months and years aforesaid, all, some, or
 " one of them, within the said parish of *Huntspill* and titheable
 " places thereof, had and kept six cows, six heifers, six steers, and
 " six oxen, after they had been turned off from plough and pail,
 " the feeding and depasturing whereof until they were fat, and
 " looked on as such, and then sold off, from the grass and herb-
 " age and depasturing of the said cows, heifers, steers, and oxen,
 " being monthly worth five shillings, and the tithe after that rate.
 " Also, that the said *Nicholas Hicks*, the months and years aforesaid, all, some, or one of them, had and kept feeding and depasturing eight cows and heifers, and of them had fallen and re-
 " ceived eight calves yearly, each calf at seven weeks old (which

" is

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As appears by
copy of the li-
bel.

Ready to dis-
charge the *modus*
decimandi.

• [332]

And although
the plaintiff had
pleaded all this
matter in the
spiritual court,
yet the Judge
refused to admit
it, and pro-
ceeded.

And although
a writ of prohi-
bition was di-
rected and deli-
vered to him,
yet he hath since
proceeded.

“ is the customary time for the *tithe* calf), being worth ten shil-
“ lings, and the tithes after that rate, as by a copy of the libel and
“ schedule aforesaid, brought here into court and read, among
“ other things more fully appears: and him the said *Nicholas*
“ *Hicks*, in the said court christian, before the said spiritual judge,
“ by occasion of the premises, hath unjustly bound to appear and
“ answer to the said *Samuel Woodeson* of and upon the premises:
“ and although he the said *Nicholas Hicks*, in every year of the
“ years aforesaid wherein he the said *Nicholas* had any lambs,
“ calves, or colts, any milch cows or heifers, any hay, any gar-
“ dens or orchards, within the parish aforesaid, and the bounds,
“ limits, and titheable places thereof, being, growing, renewing,
“ or forthcoming, or hath dwelt within the parish aforesaid,
“ hath been always ready and offered, and yet is still ready, to
“ pay to the said *Samuel* the said several sums of money for the
“ tithes of lambs, calves, colts, milch cows and heifers, hay,
“ gardens, and orchards, and for the oblations aforesaid, ac-
“ cording to the form and effect of the * several *modus*'s of tithing
“ aforesaid: and although he the said *Nicholas* all and singular the
“ premises aforesaid hath pleaded and alledged in his discharge of
“ payment of the tithes by the said *Samuel* demanded in the said
“ court christian, before the said spiritual judge, and hath often
“ offered to prove the same by unavoidable testimony, yet the said
“ spiritual judge hath absolutely refused to admit or receive that
“ plea, allegation, and proof: and the said *Richard Hely* with all
“ his power endeavours and daily contrives to condemn the said
“ *Nicholas*, by the definitive sentence of the said court christian,
“ of and upon the premises in the libel and schedule aforesaid
“ contained, and to compel him to pay the tithes aforesaid, in form
“ aforesaid demanded, in contempt of the said lord the now king
“ and lady the now queen, their crown and dignity, and to the
“ great damage, prejudice, and manifest impoverishing of him the
“ said *Nicholas Hicks*, and against the due form of law and pre-
“ scription and customs and *modus*'s of tithing aforesaid: and
“ although the said *Nicholas Hicks*, on the last day of *August*, in
“ the fifth year of the reign of the said Lord *William* and Lady
“ *Mary*, now king and queen of *England*, &c. at *Huntsprill* aforesaid, in the county aforesaid, the writ of the said lord the king
“ and lady the queen of prohibition to the contrary to him the
“ said *Samuel Woodeson* delivered: nevertheless the said *Samuel*
“ *Woodeson* hath not ceased to prosecute the said plea against the
“ said *Nicholas*, but hath further prosecuted that plea in the said
“ court christian (notwithstanding the said writ of prohibition),
“ in contempt of the said now lord the king and lady the queen,
“ and contrary to the prohibition aforesaid: whereupon the said
“ *Nicholas*, who sues as well for the said lord the king and lady
“ the queen in this behalf as for himself, &c. says, that he is in-
“ jured, and hath damage to the value of two hundred pounds;
“ and thereupon, as well for the lord the king and lady the queen
“ as for himself, he brings suit, &c.”

And

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And now at this day, to wit, *Friday* next after the morrow of the *Holy Trinity*, in this same Term, until which day the said *Samuel Woodeson* had leave to imparl to the bill aforesaid, and then to answer, &c. before the lord the king and lady the queen at *Westminster* come as well the said *Nicholas*, who sues as well, &c. by his attorney aforesaid, as the said *Samuel Woodeson*, by *Giles Clarke* his attorney; and the said *Samuel* defends the force and injury when, &c. and all contempt, and whatsoever, &c. and saith, that he hath not prosecuted the plea aforesaid against the said *Nicholas* in the court christian after the prohibition of the said lord the king and lady the queen to him thereupon delivered, as the said *Nicholas*, who sues as well, &c. above supposes; and of this he puts himself upon the * country, and the said *Nicholas*, who sues as well, &c. thereof, likewise; but for having a writ of the lord the king and lady the queen of consultation as to the tithes of lands, for which the said *Samuel* hath drawn into plea the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, he the said *Samuel* saith, that the said *Nicholas*, in the months and years in the declaration aforesaid specified, had, kept, and depastured, upon his lands and tenements within the parish of *Huntspill* aforesaid twenty ewe sheep, and of them had twenty lambs yearly, every one of them of the value of three shillings, for the tithes of which said lambs to the same *Samuel*, as rector of the parish church aforesaid, due and payable, he the said *Samuel* drew into plea him the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as it was lawful for him to do; without this, that within the parish of *Huntspill* aforesaid, and the bounds, limits, and titheable places of that parish, there is had, and from time whereof the memory of man is not to the contrary there hath been had, such a custom and *modus* of tithing of and concerning the tithes of lambs there falling, brought forth and forthcoming, to wit, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who in any year hath had any lamb or lambs under the number of seven lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, and hath paid, and for all the time aforesaid hath been used and accustomed to pay, to the rector of the parish church of *Huntspill* aforesaid, or to his farmers or deputy of that rectory for the time being, in the same year, one halfpenny, of the like lawful money of *England*, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content, of all tithes of those lambs; but if the same occupier in any such year hath had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming, then the same occupier hath rendered and delivered, and for all the time aforesaid hath been used and accustomed to render and deliver, to the rector of the parish church of *Huntspill* aforesaid, or to his farmer or deputy of

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Woodeson.
Defendant im-
pairs.

Plea.

As to the tithes
of lambs.

* [333]

Defendant tra-
verses the mo-
dus.

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against
Woodeson.

* [334]

The like for
calves.

Traverse as to
calves, &c.

And so also for
all the other
matters.

* [335]

that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs: and if the same occupier in any one year hath had any lambs to the full number of seventeen lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, then the same occupier hath * rendered and delivered, and for all the time aforesaid hath been used and accustomed to render and deliver, to the rector of the parish church of *Huntspill* aforesaid, or his farmers or deputy of the said rectory for the time being, two lambs of the same seventeen lambs in every such year, for the tithes of the same seventeen lambs, as the said *Nicholas* above thereof complains; and this he is ready to verify: wherefore he prays judgment, and a writ of the said lord the king and lady the queen of consultation, as to the tithes of lambs aforesaid; to be granted to him in this behalf, &c. And for having a consultation as to the tithes of calves aforesaid, for which the said *Samuel* hath drawn into plea the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, he the said *Samuel* saith, that the said *Nicholas*, in the months and years aforesaid, had kept and depastured upon his land and tenements within the parish aforesaid sixteen cows and heifers, and of them had fourteen calves yearly fallen, brought forth and forthcoming, each of the same calves of the value of ten shillings, for the tithes of which said calves to the same *Samuel*, as rector of the parish church aforesaid, due and payable, he the said *Samuel* drew into plea him the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as it was lawful for him to do; without this, that within the parish of *Huntspill* aforesaid, and the bounds, limits, and titheable places thereof, there is had, and from time whereof the memory of man is not to the contrary there hath been had, a custom that every occupier of any lands or tenements within the parish aforesaid, and the bounds, limits, and titheable places of the same parish, who had any calf or any calves under the number of seven calves in any year brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, and hath paid, and for all the time aforesaid hath used and been accustomed to pay, to the rector of the parish church of *Huntspill* aforesaid, or his farmers or deputy of that rectory for the time being, in every such year, one halfpenny, of the like lawful money, for each of the said calves, in full satisfaction, payment, and content, of all the tithes of those calves; but if the same occupier (as before in the traverse as to lambs). And for having a consultation as to tithes for depasturing of colts, cows, steers, heifers, and oxen, not employed to plough or pail, and also other unfruitful cattle within the parish aforesaid depastured, for which he the said *Samuel* hath drawn into plea the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, he the said *Samuel* saith, that the said *Nicholas* * in every year of the years aforesaid had kept and depastured upon his lands

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lands and tenements aforesaid, within the parish aforesaid, colts, cows, heifers, and oxen, not employed to the plough or pail, and other unfruitful cattle in the declaration aforesaid mentioned, for the tithes of depasturing of which said cattle to him the said *Samuel*, as rector of the parish church aforesaid, due and payable, he the said *Samuel* drew into plea him the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as before is set forth, as it was lawful for him to do; without this, that within the said hundred of *Huntspill* and *Puriton* there is, and for all the time aforesaid there hath been, an ancient custom for all the time aforesaid used and approved, that all the inhabitants within the hundred aforesaid occupying any lands, meadow or pasture, within the hundred aforesaid, have been free, exempt, and discharged, and from time to time, for all the time aforesaid, ought to be free, exempt, and discharged, of and from the payment of any tithes of or for the depasturing of any cattle not employed to plough or pail, by them depastured in any lands, meadow or pasture, being within the hundred of *Huntspill* and *Puriton* aforesaid, as the said *Nicholas* above complains; and this he is ready to verify: wherefore he prays judgment, and the writ of the said lord the king and lady the queen of consultation, as to the tithes for the depasturing of cattle not employed to plough or pail, and of other unfruitful cattle, for which the said *Samuel* hath drawn into plea him the said *Nicholas* in the court christian aforesaid, as before is set forth in this behalf, to be granted to him, &c. And for having the writ of the said lord the king and lady the queen of consultation as to the offerings aforesaid, the tithes of milch cows and heifers aforesaid, the tithes of hay aforesaid, the tithes of gardens and orchards aforesaid, and the said tithes of the said four colts in the parish aforesaid yearly fallen, for which he the said *Samuel* hath drawn into plea him the said *Nicholas* in the court christian aforesaid; the said *Samuel* prays judgment of the declaration aforesaid, because he saith, that the said declaration, and the matter in the same contained, are not sufficient in law to compel him the said *Samuel* to answer to that declaration as to the same oblations and tithes; to which the said *Samuel* hath no necessity, nor is bound by the law of the land, in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient declaration in this behalf, he the said *Samuel* prays judgment of the declaration aforesaid, and that the said declaration as to the said oblations and tithes * may be quashed, and that * the writ of the said lord the king and lady the queen may be thereupon granted to him, &c. And the said *Nicholas* saith, that by any thing by the said *Samuel* above in pleading alledged, he the said *Samuel* ought not to have the writ of the said lord the king and lady the queen of consultation; because as to the said plea of the said *Samuel* in manner and form above pleaded, as to the tithes of lambs, for which the said *Samuel* hath drawn into plea him the said *Nicholas* in the court christian aforesaid, before the said spiritual judge, he the said *Nicholas* as before saith, that within

Hic res
agitur
Wob. 2. 2.

Traverse as to
custom in the
hundred of not
decimando.

Demurrer to
part.

Replication.

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**Hicks
against
Woodeson.**

Takes issue on
the traverse of
the *modus* as to
lambs.

the parish of *Huntspill* aforesaid, and the bounds, limits, and titheable places of that parish, there is had, and from time whereof the memory of man is not to the contrary there hath been had, such a custom and *modus* of tithing, of and concerning the tithes of lambs there falling, brought forth and forthcoming, to wit, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who in any year hath had any lamb or lambs under the number of seven lambs, brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, hath paid, and for all the time aforesaid hath been used and accustomed to pay, to the rector of the parish church of *Huntspill* aforesaid, or to his farmers or deputy of that rectory for the time being, in the same year, one halfpenny, of the like lawful money of *England*, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content, of all tithes of those lambs: but if the same occupier in any such year hath had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming, then the same occupier hath rendered and delivered, and for all the time aforesaid hath been used and accustomed to render and deliver, to the rector of the parish church of *Huntspill* aforesaid, or to his farmer or deputy of that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs; and if the same occupier in any one year hath had any lambs to the full number of seventeen lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, then the same occupier hath rendered and delivered, and for all the time aforesaid hath been used and accustomed to render and deliver to the rector of the parish church of *Huntspill* aforesaid, or his farmers or deputy of the said rectory for the time being, two lambs of the same seventeen lambs, as the said *Nicholas* above thereof complains: and this he prays may be inquired of by the country, and the said *Samuel* likewise, &c.

The like replications and issues joined upon the other traverses, as to the *modus* for calves, and as to the custom alledged in *non decimando* in the hundred of *Huntspill*. And a joinder in demurrer as to the rest.

Case 121.

Hicks against Woodeson.

A custom of PROHIBITION. The plaintiff suggested, that the parish of *Huntspill* is an ancient parish, of which he was an inhabitant, and used lands there; that in the said parish there is a custom to pay tithes cannot be alledged in a hundred or in a county.—S. C. 2. Salk. 655. S. C. Carth. 393. S. C. Comb. 403. S. C. Holt, 671. S. C. Skin. 560. S. C. 12. Mod. 111. S. C. 1. Ld. Ray. 137. S. C. Ray. Ent. 170. Parl. Cas. 192. Fitzg. 79. Comy. Rep. 656. 3. Com. Dig. "Dismes" (E. 4.).

several

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several small sums to the parson in lieu of *small tithes*, which sums are particularly set forth; that this parish was within the hundred of *Huntspill*; and that there is a custom also for every inhabitant and occupier of lands within the said hundred to be discharged of tithes for the pasture of barren and unprofitable cattle. The defendant traversed the customs; and issue being thereupon joined, it was found for the plaintiff.

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WOODSON.

And now it was moved in arrest of judgment,

FIRST, That a custom alledged *in non decimando* in a whole hundred is void in law.

SECONDLY, Admitting it to be good, yet it was not well pleaded here, because the plaintiff had not shewn that there was a sufficient maintenance for the parson besides those tithes.

FIRST, It was argued that this custom was against common right, because there was never yet any precedent of a custom to discharge a layman *in non decimando*. It is agreed, that as to ecclesiastical persons, such a custom may be good, but not as to a layman, * because he was not capable, at the common law, to have tithes, * [337] and therefore could not sue for them in the spiritual court, but now he is enabled by the statute of 32. Hen. 8. c. 7. And as tithes in general are due of common right, so this particular tithe of agistment of barren cattle is due the rather, because those which are for the cart are discharged by custom; it is the whole profits of the land out of which some things must be paid to the parson. A layman is allowed to prescribe *in modo decimandi*, but not to be exempted from all tithes in general, because some must be paid and are due of common right, though the quantity be ascertained by custom and usage. If therefore tithes are due of common right, such a prescription either in a *hundred* or a *county* will not be good, because, if it should be allowed, every person in that hundred or county might prescribe; and nothing would be left for the parson. It is true, my LORD ROLLE affirms the contrary (a), but he denies it again in the same line (b); which shews that book to be of little authority in this case. It is likewise said in the same book (c), that a prohibition was granted in a case of the same nature with this, which was thus, *viz.* A man prescribed to a custom within two hundreds of *Middlesex* and *Surrey*, that if a common baker dwelling in either of these hundreds should erect a mill there to grind corn for his trade, and sell it to customers in or near those hundreds for their sustenance, such a baker should pay no tithes for the corn. But the reason upon which that case was adjudged does not suit with this; for the parson there had more and greater tithes out of the lands of the inhabitants, and of them who were sustained in those hundreds, than he could have by the manual occupation of a miller. In *Michaelmas Term* in the eleventh year

(a) 1. Roll. Abr. 653. pl. 9.

654. pl. 20. 3. Com. Dig. "Disines"

(b) 1. Roll. Abr. 654. pl.

(E. 4.).

(c) Kidder v. Edwards, 1. Roll. Abr.

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of *Charles the First*, and in the same book (a), it is mentioned, that a prohibition was granted upon a surmise that tithes ought not to be paid for pheasants eggs, or young pheasants hatched in woods inclosed in the Chiltern of *Buckinghamshire*; but that was because they were *fera natura*. Such a custom as is here alledged could never have a reasonable commencement, because of common right tithes ought to be paid out of all land (b); and though before the Council of *Lateran* no person could claim them, because there were no parishes (c), yet still they were due to the church, * though it was in the power of the donor to give them to what spiritual person he thought fit (d). It is *in favorem ecclesie* that the law will not allow a prescription *in non decimando* to prevail against her. It is true, a prescription strengthens all other titles, but is of no force when pleaded in discharge of tithes (e), because the law presumes that a layman cannot be absolutely discharged without the consent of the parson, the patron, and the ordinary; and then likewise the grant of such discharge or exemption must appear (f). This was the opinion of *DODERIDGE*, *Justice* (g), grounded upon the authority of *Lyndewode* (h), and of the author of the *Doctor and Student* (i). The whole country may be discharged of tithes, but such discharge ought to have a reasonable commencement, which must be shewed. Now it would be very strange that the law should reject a prescription to be discharged of tithes in a particular place, and yet to allow a custom in a whole hundred *in non decimanda*. One single instance may be given where such a custom has been allowed; it is in my *LORD ROLLE's Abridgement* (k), and it was for the milk of ewes; and probably the reason might be, that such milk is of little value to the parson, and does not much contribute to his maintenance, for which tithes were originally ordained; but it is but one single case, which does not make a law. The case of *Russel v. Backburst* (l), which seems to give some colour to such a custom, is a controverted case; it was thus: The parson libelled for tithe-wood, and the defendant prayed a prohibition by reason of a prescription *in non decimanda* for wood growing in the Weald of *Kent*: it is true, the prescription there was denied, and no prohibition granted (m): this was in *Michaelmas Term* in the twelfth year of *James the First*; and yet but two years afterwards there was a trial at bar in this court upon a prohibition, where such a prescription was suggested to be discharged of tithes of the under wood growing in the Weald of *Sussex*; and it was found for the plaintiff; and the Court held the prescription good (n). But admitting such a prescription *in non deci-*

(a) 1. Roll. Abr. 636.

(b) *Priddle v. Napier*, 11. Co.

(c) *Hob.* 296.

(d) *Jones* 373. *Moor*, 219. 1 and see *Charlton v. Charlton*, *Bunb.* 325.

(e) *Bury v. Evans*, *Bunb.* 345.

(f)

(g) 2. *Bulst.* 285.

(h)

(i) *St. Germaine*.

(k) 1. *Roll. Abr.* 654. pl. 12. *Litt. Rep.* 152. 2. *Inst.* 653.

(l) 2. *Bulst.* 285.—See also 1. *Roll. Abr.* 653. pl. 54. 654. pl. 5. 2. *Roll. Rep.* 122. *Palmer*, 37. 2. *Inst.* 645. 653.

(m) 1. *Roll. Abr.* 653. pl. 10.

(n) *Palm.* 37. 2. *Roll. Rep.* 122.

quanda

mando for underwood in a *Weald* be good, yet it will not affect this case, because in ancient times there were many controversies about such tithes; for at the common law tithes were not to be paid for trees, because cutting them down * is not an increase of their growth as in corn, but a total destruction; it is an uncertain profit, and not arising yearly for the maintenance of the parson; neither are those tithes due of common right, but by custom and usage; and therefore in those days, and in those places where tithe-wood was due only by custom, the parishioners procured wood or other lands for the parson and his successors in satisfaction of all tithe-wood in the same parish (a). Several petitions have been made to the parliament concerning the right to such tithes, until the statute of *Sylva cædua* (b) was made, by which all those controversies were ended; it being enacted, "that tithes shall not be paid for wood of twenty years growth or more," which implies it shall be paid for all under that age. It is true, it was the opinion of my LORD COKE (c), that such a prescription in a county, not only for wood, but for any other tithe, is good; but that can be no reason why it should be allowed in a hundred, because the Court cannot judicially take notice what a hundred is, or what it comprehends (d); it is a liberty in its commencement; it is to have a jurisdiction over a hundred vills, or so many parishes; and therefore it has been held, that a leet cannot be parcel of a hundred, because they are both liberties, and one liberty cannot be parcel of another (e). But it does not appear by the pleading, that there is more than one parish in this hundred; if so, such a custom in a parish can never be made good (f). Besides, there is no consequence to say that there is such a custom in a county, therefore it may be in a hundred, because there can be no inference from one to the other; and even in that case it will be very difficult to find a reason how a county at first came to be exempted from payment of tithes. My LORD ROLLE uses the words "province" and "county" as synonymous: now "a province" being only a circuit within the jurisdiction of an archbishop (g), probably there might be an agreement between the clergy and the laity that such a place, &c. should be exempted from the payment of tithes; but there could be no such agreement in a hundred, because that was divided from the county, and became a particular district and the inheritance of several persons, but the bailiwicks thereof were re-united to the counties by the statute of 4. Edw. 3. c. 15. and 14. Edw. 3. c. 9. * It is agreed on all sides, that a single parish cannot have such a custom (h); and this is a strong reason why a hundred cannot, because it consists and is made up of several parishes; and it is as good a reason that a hundred cannot

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(a) 13. Co. 13.

(b) 45. Edw. 3. c. 3.

(c) 2. Inst. 645.

(d) Year Book 8. Hen. 7. 1. b.

(e)

(f) 1. Roll. Abr. 653. pl. 47.

2. Inst. 645. March, 25. pl. 59.

(g) Co. Lit. 94. 1. Bl. Com. 111.

(h) 1. Roll. Abr. 653. 2. Inst. 645.

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have such a custom because a *parish* cannot, as it is to say a *county* may, and therefore a *hundred* may have it.

SECONDLY, But admitting a hundred to be capable of such a custom, yet it cannot be so large as this, because there must be a sufficient maintenance left for the parson, which does not appear in this case; and so are all the books where such prescriptions have been allowed, which are very few, but never to have such effect as this, *viz.* to take away the maintenance of the parson; and therefore the plaintiff in the prohibition ought to have shewn that there was sufficient for him besides, because it is a discharge against common right, and no other reason can support it, but to shew that the parson has *uberiores decimas* besides the tithes alledged to be exempted; and this was the only reason of the judgment in the case of *Kidder v. Edwards* (a).

E contra. If there may be a custom (as it is admitted) to be discharged in a whole county of tithe-milk, and of tithe-corn ground at such a mill or mills in a hundred, there may be also a custom to be discharged of the tithes of fat cattle, and if the parson has lived without such tithes time out of mind, he may live so still. It is granted on the other side, and an authority was produced of a custom to be discharged of tithes out of two hundreds, and there can be no reason, if that is law, why such a custom may not be good in one hundred. It has been objected, that a layman cannot prescribe *in non decimando*, but no good reason can be given for it (b). It cannot be because of any disability in his person; for as to this matter there is no difference between a *layman* and a *clerk*; it must therefore be *in favorem ecclesie*, and introduced by ecclesiastical persons who were formerly Judges here, as part of the canon law, who had in those days such a power over the laity, that they would not suffer such a prescription to be tried by them, neither would they suffer them to sue for tithes in their courts. * This is the reason why it is generally said in our books that a layman cannot prescribe *in non decimando*; but though he cannot prescribe, &c. yet there may be a custom to exempt him from tithes, and such a custom is of as good authority as a prescription; for if it is established by long usage and by the common consent of our ancestors, it passes into a law of that place, and is of equal force with a prescription. Such is the custom of *gavelkind* (c), and *borough English* (d), which is the law of *England*, and as ancient as the common law in the places where these customs prevail. It is true, where a custom of a public nature is alledged in a particular vill or place, it must be shewed that it is an ancient vill; as where a man claimed lands on the south side of a vill, setting forth that they were time out of mind devisable, and so derived a title to himself by a

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(a) 1. Roll. Abr. 654.

(b) 1. Roll. Abr. 653. pl. 5. Cro.
Jac. 44. Moor, 425. Hob. 297.

Bunbury, 325. 345;

(c) Year Book 40. Aff. pl. 27.

(d) Year Book 21. Edw. 4. pl. 52.

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feoffment from the last devisee, this was held void; because, it being a custom against common law, he ought to have set forth that the vill was an ancient vill; but if he had alledged such a custom in a borough, which *ex vi termini* imports a place of antiquity, it had been good (a). Now in this case it is alledged, that the parish of *Huntspill* is an ancient parish, and then the custom is set forth, which is agreeable to the authority before mentioned. And if the custom be not contrary to reason and justice, the Judges never enquire into the commencement of it. No man can say, that this custom is unreasonable, because it goes only in discharge of a single duty: now all the books which condemn prescriptions *in non decimando*, either in a county or in a parish, are where they are made generally of all tithes, but they are seldom denied for a particular thing, as in this case. And therefore a custom to pass in a ferry-boat toll-free has been adjudged good (b), though it is far more unreasonable than this, because it is only a discharge to the person claiming it, and may be a charge to another. So there are many things which are not titheable of common right, as fish taken in the sea, rabbits and pigeons spent in the house, &c. and yet by custom tithes of those things have been paid to the parson (c); if therefore it be a reasonable custom for the clergy to charge the laity with tithes of such things which of common right ought not to be chargeable, it is as reasonable that a layman may discharge himself by a custom in a place where none have been usually paid. * Such a custom (as has been observed) is not good in a parish; not because it is inconsistent with the law; the reason is, a single person or parish are not capable of such a custom (d). Besides, the law requires that the parishioners should shew what recompence the parson has in lieu of his tithes, by which it may appear that the custom had a reasonable commencement; but no such thing is required of a whole county, because it cannot with any shadow of reason be pretended, that all the inhabitants could or can conspire to defraud their respective parsons. But there are books which allow a custom or usage to be good in places of as large extent (e), which customs will not bind when alledged in a vill; as in a *cessavit per biennium*, the lord shewed the custom of the place to be, that where the tenant did not pay his services in two years, he might enter and hold the lands till he was satisfied of the arrears; this was held to be void, because the usage was alledged in a particular vill only, and not shewed that it was customary so to do in the vills round about. But a custom in an hundred in *Kent*, that if any one be charged to have gotten children in adultery, and cannot acquit himself by law, that then he shall forfeit all his goods to the king, was held a good custom (f). So a custom in an hundred, that if a waif or estray be eloigned, and it is presented that it

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2. Peer Wms.
573.

Stra. 1224

(a) Co. Lit. 109. Brady, 2.

(b) 2. Mod. 291.

(c) 1. Roll. Abr. 642, 646, Cro,
Car. 164.

(d) Dr. and St. 167. 13. Co. 13.

(e) Year Book 43. Edw. 3. pl. .

32. Edw. 3. pl. 30.

(f) 1. Roll. Abr. 562.

came

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came to the possession of any dwelling within the hundred, the lord may distrain till he make restitution (*a*). So a custom that an infant of the age of fifteen years may make a feoffment, and sell his lands (*b*); all these are against common law; but being used in a hundred or county, are thereby become the laws of the places where they obtain. But to come nearer to the case, it will not be denied that a custom alledged in a parish, for all underwood to be discharged of tithes which is used in that parish for fencing corn, is good (*c*), but then you must shew that the tithe of that corn is paid to the rector; but it may be alledged in a county, weald, or country, without any consideration at all. And therefore BROOK in his *Abridgement*, referring to the author of *Doctour and Student*, says (*d*), that a man cannot prescribe in a vill to be discharged of tithes, because it is too particular; but such a prescription is good in a whole county or hundred, because it is the custom of the place (*e*). * It has been objected, that a custom in *non decimando* may be good in a county, but not in a hundred, because of the uncertainty of its extent: sure that is a reason of very little force, for the limits of a county are altogether as uncertain as those of a hundred; but a hundred is a known precinct, and not barely a liberty (*f*), as has been said, though there may be many liberties therein; for when granted to a subject it is a liberty (*g*), but when it remains part of the county it is otherwise; and therefore in an avowry a man may prescribe by a *que estate* to have a leet in a hundred (*h*); but if a *quo warranto* be brought against the hundred, he must then set forth his title. Besides, if the words "province" and "county" are synonymous, a county and hundred are so too; and that in the meaning of the law, as may plainly appear; for all issues are to be tried by jurors of *the county* (*i*), that is, by jurors of *the hundred*; for it was a good challenge at the common law if there were no hundredors of the jury (*k*). In the statute of *Winton* (*l*) these words are used promiscuously; it appoints, "that inquests of felonies and robberies shall be taken in towns, hundreds, franchises, and counties, so that the offender may be attainted; and if the county will not answer for him, then it shall be answerable for the robbery done, so that the whole hundred where the robbery is committed shall be liable." Such a custom in a hundred has never yet been condemned, for it never came in judgment but in the case for tithe-wood, and there it was held to be a good custom, even in a whole weald; and what reason can be given why it should not be good in a hundred as well as in a weald, which is as ancient as the other, especially when it cannot be denied but such discharge might begin by composition. It is objected, that *tithe wood* is not due of common right,

Ld. Ray. 855.
860. 1135.
1161.

(*a*) Year Book 44. *Edw.* 3. pl. 14.
21. *Edw.* 4. pl. 24.

(*b*) See Rob. on Gav. 193; and Mr. Vaillant's Edit. Dyer, 301. a. pl. 41. notis.

(*c*) 1. Saund. 141.

(*d*) Bro. Abr. title "Dismes," pl. 14.

(*e*) March. 25. 1. Roll. Rep. 22.

(*f*) 2. Roll. Abr. 73.

(*g*) 1. Vent. 405.

(*h*) 1. Leon. 217. 218.

(*i*) 2. Hen. 4. c. 6.

(*k*) 11. Hen. 4. c. 2.

(*l*) 13. *Edw.* 1. c. 2.

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as all other tithes are, and therefore a custom *in non decimando* for wood in a hundred may be good. But tithe-wood is due of common right (a); if not, to what purpose was the statute *de Sylva cædua* made? It was to ascertain what wood should pay tithes, and what should be exempted; and why did the nobility and commons prefer several petitions to the king, after the making that statute, that it might be explained what was meant by *sylva cædua* (b), if no tithes were due for wood, which is an admission that tithes had been paid for it before that act. * Agreeable to this is the common way of demanding tithes for wood at this time; for the libel is always general, which shews that the party has a right to demand; for if he had not, then he must alledge a custom, and yet prohibitions are never granted upon such general libels. Suggestions are also made always in the affirmative, but if they were due by custom, and not of right, then they ought to be in the negative, *viz.* to deny that there is any such custom.

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against
Woodston.

* [344]

SECOND POINT. Then as to the objection, that it does not appear that the parson has a sufficient maintenance left, the pleading seems to be otherwise; for there are several *modus's* set forth for tithes yearly arising in the parish, which may give him a convenient maintenance every year; and if he has a sufficient provision by any one *modus*, it is not material by whom he receives it.

CURIA. It will be difficult to shew a *non decimando* for any tithes besides those of wood; for all the cases which incline to such a custom, are put generally, *viz.* that a county or a hundred may thus prescribe, but they do not mention what tithes are in question. Now if tithes of wood had been due of common right, to what purpose was that canon made by Archbishop Stratford, in the seventeenth year of Edward the Third, that tithes of *sylva cædua* shall be paid? against which canon there was a petition made to the parliament in that very year (c), reciting the ancient usage to be, that tithes should not be paid for wood; and the petition was answered, that a prohibition should be granted against the canon where tithes of wood have not been accustomed to be paid. It is true, the ecclesiastical courts do hold, that tithes are due of common right for every thing, nay, even for stones or gravel digged out of pits, but the common law is otherwise; for tithes of common right are due only for such things which arise by annual profits: now though trees are renewing yearly, yet they yield no annual profit, and therefore tithes are not paid for them (d). Therefore where tithes are paid for things which do not arise by such means, they must be due by custom. But such a custom *in non decimando* cannot be good.

12. Mod. 524.
2. Vern. 46.
Ld. Ray. 835.
869. 3235.
1161.

And therefore a consultation was granted.

(a) 3. Com. Dig. "Disines" (H. 3.)

(c) Dr. and St. 164. 169. Godolph.

(b) 1. Roll. Abr. 638. 639. 2. Inst. 467.

(d) 2. Inst. 647. 5. Bac. Abr. 54.

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Case 122.

* The King and Queen *against* Trobridge.

A return *ad proximam sessionem ubique* instead of *ad proximam generalem sessionem pacis*, is good.

A WRIT OF ERROR to reverse a judgment in an *indictment* for erecting of a cottage, and not laying of four acres of land to it, *et ulterius jur. &c. presentant*, that the defendant did continue it *contra formam statuti*.

The errors assigned were,

Ld. Ray. 548.

FIRST, The return is uncertain, for it is returnable *ad proximam sessionem ubique*, whereas it should have been *ad proximam generalem sessionem pacis*.—*Sed non allocatur*; for one is as uncertain as the other.

An indictment for erecting a cottage contrary to 31 Eliz. c. is good, without saying *pro habitatione*.

SECONDLY, It is for erecting and continuing of a cottage, but it does not say *pro habitatione*; and it is no offence unless it be inhabited, for the statute was made to prevent the building of cottages for the habitation of poor people.—*Sed non allocatur*; for if it is applied to any other use than a dwelling-house, the defendant must shew it, or otherwise it shall be intended to be built for his habitation.

S. C. Comb. 307.

S. C. Skin. 564.

S. C. Holt, 344. 1. Mod. 295.

An indictment for erecting and continuing a cottage, &c. concluding only that he did continue the cottage, &c. bad.

THIRDLY, It is an indictment for two offences, *viz.* for erecting and continuing; it is said *presentat. existit.* that he did erect, &c. and then about the middle of the indictment it is, *ulterius presentant*, that he did continue, and then concludes, *contra formam statuti*: now the offences being several, and being divided by the words *ulterius presentant*, &c. the conclusion shall only go to the offence last mentioned, which was *the continuing*, and not *the erecting* of the cottage; it is as distinct as if it had been a new indictment, and therefore it does not appear that the defendant was indicted for *erecting*, &c. It is not like the case in my Lord Coke's *Entries* (a), where *contra ligeancie sua debitum* went to the whole indictment, in which though there were many *overt* acts laid, yet there was but *one treason*; but here are two distinct offences.

S. C. 1. Salk.

371.

S. C. Comb. 307.

For which reason the indictment was quashed,

(a) Co. Ent. 361.

* [346]

Case 123.

* Robinson *against* Smith.

Trinity Term, 6. Will. & Mary, Roll 192.

To trespass for taking cattle, if the defendant, in justification, state, that he was

TRESPASS for taking and impounding his cow. The defendant pleaded, that at the time of the trespass, &c. he was seised of several lands parcel of the manor of MUSGRAVE PARVA *unde quoddam clausum vocat. Lowhill Meadow est et fuit parcel.*

seised of certain *copyhold lands*, of which the place *where* was parcel, and that the cattle were then *damage feasant*, he must set out the commencement of his estate.—4. Co. 22. Cro. Jac. 103. Cro. Car. 195. Yelv. 74. 10. Mod. 25. 37. 228. 11. Mod. 179. 12. Mod. 188. 509. 5. Com. Dig. "Pleaser" (E. 19.). Ld. Ray. 202. 334. 923. 1230. Stra. 1238.

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ut de statu custumario hæreditario descendible from ancestor to heir, according to the custom of the said manor, and that the plaintiff's cow was in the said close doing damages, &c.

ROBINSON
against
SMITH.

The plaintiff demurred generally.

FIRST, It was said for him, that it did not appear by the plea, that *Lowbill* was parcel of *the land* of which the defendant was seised, but parcel of *the manor*; for the word *unde* being a relative, refers *ad proximum antecedens*, which is *the manor*.

SECONDLY, It is said he was seised *de statu hæreditario* descendible, &c. and does not shew of whose grant; for though it may not appear who was the first grantee, it being so long since the copyhold was granted, yet the admittance of an heir upon a surrender or descent amounts to a grant, and ought to be so pleaded.

E contra. The defendant does not justify by reason of a title, but for a wrong done; and therefore though he says *seisitus fuit*, &c. and does not shew how, or in what manner, yet since it was only a tort with which he was charged, it is well enough, and it must have been agreed to be so if he had said *possessionatus fuit* instead of *seisitus*.

BUT THE COURT were of another opinion, for where *seisin in fee* is pleaded of a copyhold estate by way of justifying of an offence with which the defendant is charged, he must set out the commencement of his estate.

And therefore the plaintiff had judgment.

* Allen against Symonds.

Easter Term, 6. Will. & Mary, Roll 299.

* [347]
Case 124.

AN ACTION on the case was brought against the defendant by the name of *Symonds*. He pleaded in *abatement*, that from the time of his birth to the time of the action brought he was known by the name of *Symms*; and traversed that he was known by the name of *Symonds*. The plaintiff replied, that the said defendant was known as well by the one name as by the other.

A defendant may plead a misnomer of his surname with a traverse, and the plaintiff reply that he was known as well by the one name as the other.

And upon a demurrer THE COURT inclined that this plea was a good plea. But at another day, they being of opinion that the precedents were both ways upon a traverse (a), the defendant was advised to take a new declaration, which he consented to do accordingly; but without costs (b).

S. C. 3. Salk. 239. 210.
S.C. Comb. 308.

3. Mod. 203. 10. Mod. 208. 284. Comy. 371. 541. 1. Com. Dig. "Abatement" (F. 18.). 3. Bac. Abr. 624, 625. Stra. 156. 316. 614. 787. 850. 1218. Ld. Ray. 118. 249. 301. 509. 1015. 1308.

(a) Old Ent. 27. . Raft. Ent. 616.

(b) The question in this case seems to have been, Whether the plaintiff ought to have concluded his replication to *issue*, or with a *verification*? S. C. Comb. 308. And it is said, that the defendant having added a *traverse* to his plea, the replication ought to have been to the *country*; for in pleas the traverse is a ne-

gative, and every general negative must conclude to the country, and therefore the misconception of the replication had made a discontinuance. S. C. 2. Salk. 260. See Haywood v. Davis, 1. Salk. 4. ; Robinson v. Rayley, 1. Bun. 317. Boyce v. Whisker, Dougl. 95; Smith v. Dover, Dougl. 427; Hedges v. Sandon, 2. Term Rep. 439.

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If an act of parliament forbid the selling of wine in glass-bottles, and inflict a penalty for every offence; *Quære*, If the penalty shall lie on every glass-bottle, or on each quantity of glass bottles sold at one time? *Quære*, If a warrant not strictly formal, made by a justice of the peace to levy the penalty, will justify the constable who executes it.

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S. C. Skin. 445.
366.

TRESPASS for taking and detaining a *silver tankard*. Upon *not guilty* pleaded, the jury found a special verdict to this purpose.

They find the statute of 1. *Will. & Mary*, c. 34. prohibiting all trade and commerce with *France*, in which there is A PROVISIO, That no person shall after the tenth day of *September* then next following demand or take more than sixpence for a quart of *French* wine. Then they find the act of 2. *Will. & Mary*, sess. 2. c. 14. for more effectual putting in execution the former act, whereby it is enacted, " That if any person after the first day of *February* 1690, shall sell wine by retail in glass-bottles, or in any other measure not made with pewter, &c. or shall sell the same for a greater price than appointed by the former act, and shall be convicted thereof by confession, or the oath of two witnesses, being prosecuted within thirty * days after the offence committed, he shall for every offence pay fifty shillings, and if not paid upon demand, then to be levied by distress by warrant under the hand and seal of such justice, &c. before whom the conviction was made; which warrant the justice is required to grant to the constable, &c. who is authorized to levy the same, &c. and for want of sufficient distress, to commit the offender until he pay the penalty, and all necessary costs to be taxed by the justice of peace before whom the conviction is made." They find, that on the third day of *August*, in the fourth year of *William and Mary*, Sir *Richard Bulkley* being a justice of peace of the county where the offence was committed, directed his warrant to the constable of the parish, &c. which they find *in hæc verba*; by which it appeared, that the defendant was convicted before him, for that he on the ninth of *July instantis* did sell wine in eighteen glass-bottles, for which he had forfeited to the informer fifty shillings for each bottle; and by this warrant the constable was commanded to levy forty-five pounds and costs by distress of the plaintiff's goods, and for want of sufficient distress, to apprehend him. It was dated in *August*. They find, that the said second day of *July*, in the fourth year of *William and Mary*, the plaintiff was a retailer of wines, and that the warrant of the justice of peace was directed to the defendant *Halford*, who by virtue thereof levied the silver tankard, for which the action is now brought, and so they make a general conclusion, &c.

It was argued for the plaintiff, that he was entitled to the action, and that neither the act of parliament, or the warrant of the justice, could excuse the defendant for this wrong done.

FIRST, Because the warrant is illegal.

SECONDLY, Because the defendant, though an officer, yet in this case shall be punished for acting under a void warrant.

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THE FIRST POINT, That the warrant was illegal, was thus argued :

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I. There are two acts of parliament found by the verdict; the first settles the offence, the second reduces the forfeiture to fifty shillings for the benefit of the informer; but in both it is to be levied for every offence, *viz.* not for every bottle drank at one sitting, if twenty or more, for that is but one offence, being but only at one time, and not for every bottle; but the warrant directs that eighteen penalties shall be levied for one offence.

Ld. Ray. 1421.
Stra. 718. 1124.

* II. The offence is laid to be committed on the ninth of *July instantis*, and the warrant is dated in *August*, but it does not appear when that ninth of *July* was, and therefore *non constat* whether the prosecution was within the thirty days limited by the act.

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III. The statute allows *costs* where there is not sufficient distress to be made, and it must be after the commitment of the offender; but this warrant directs *costs* to be paid for the original offence.

SECOND POINT. The warrant, though directed to the defendant as an officer, will not excuse him.

It is true, that where a court has a general jurisdiction of the cause, and sends a void or an illegal warrant to the officer, he shall be excused in executing of it. So likewise if a justice of peace proceed irregularly; and it do not appear so upon the face of the warrant; as if he send it to apprehend a felon without oath made of the felony committed, and the officer executes it, he shall be excused; but the justice is a trespasser. But where a defect appears in the body of the warrant itself, as in this case, the officer is bound to take notice of it at his peril, though he is not equally bound to take notice of little niceties: and to prove this the case of *Nichols v. the Churchwardens of Hatfield (a)*, was cited as an authority in point; it was thus, *viz.* *Tateridge* was a parish in reputation for sixty years, though anciently parcel of *Hatfield*; the churchwardens of *Hatfield* imagining that they had power, by virtue of the statute of 43. *Eliz.* c. 2. to tax the inhabitants of *Tateridge* to the relief of their poor, did tax them accordingly, and upon refusal to pay the rate, procured a warrant to levy it, which was done upon *Nichols* the plaintiff, who brought the action; and the churchwardens justified under the warrant; and it was adjudged that it would not excuse them. It is true, the churchwardens went out of the parish to levy that rate, but that was not the reason of the judgment; it was because the justices of peace had only a particular power to make warrants to levy rates which were well assessed, and therefore the churchwardens at their peril ought to take notice whether the justices had executed their power according to law; and it appearing that the rate was illegally taxed, the warrant of the * justice will not excuse the churchwardens in taking the distress. This case is good law at this

Ld. Ray. 55.
66. 424. 545.
699. 1191. 1530.
12. Mod. 306.
10. Mod. 343.
381.
Fitzg. 80.
Comy. 378. 538.
574.
109. 1022.
1184.

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day, and the authority of it was never shaken, no not by the case of *Webb v. Batchelor* (a), where the defendant justified in trespass under the warrant of a justice of peace for distraining of a parson's cattle, because he did not send out labourers, &c. to amend the highways: the parson pretending that clergymen were exempted from that duty, it was there said, that if for that reason the warrant had been unduly made, yet the officer had been excused in the execution of it, because he is not to judge of but to execute the precept: but it is likewise said the matter must be within the jurisdiction of the justice, which was so in that case but not in this. Agreeable to this is a later resolution in the exchequer, in the case of *Terry v. Huntington* (b), where in *traver* the defendant justified under a warrant of the commissioners of excise, &c. and it was held by my LORD HALE, that where a particular jurisdiction exceeds its authority, the officer is liable, because all is void; for every limited authority implies a negative, *viz.* that they shall not proceed any otherwise than according to the authority they have; but if they commit a mistake in any thing which is in their power or jurisdiction, it will be an excuse to the officer; but what the justice did in the case at bar did far exceed his power, for he is to cause one penalty to be levied for one offence, and he has sent out his warrant to levy no less than forty-five pounds, which is eighteen forfeitures for one single offence. Suppose this court should hold pleas in *formedons*, all the proceedings would be void, because it is confined by MAGNA CHARTA to the court of common pleas alone (c). The offence here is created by act of parliament, of which all people are to take notice at their peril, and to see that the proceedings are pursuant to the authorities and powers thereby given. The statute of 6. Hen. 6. c. 5. enacts, "That no person shall be spared towards the repairs of banks who have any manner of benefit by keeping them in repair;" the authority of the commission of sewers, which is grounded upon this statute, is very extensive, *viz.* "that the commissioners may do therein according to their discretion;" but yet it has been held (d), that they ought not to tax that man alone whose land adjoins to the river, but all others whose lands are in danger to be overflowed with water; and therefore a tax being laid upon a single person, and a distress taken for non-payment, is * tortious, because it being given by virtue of a general law, the officer at his peril must examine and enquire into the authority. By this it appears that there is a difference between things done by a justice of the peace *quatenus* such and by virtue of his authority, and those which are done by him by virtue of an act of parliament, and of a particular restrained power to him given thereby; for in the one case the officer must not examine but execute his warrants, and in the other he must enquire into his power, because it is by virtue of the statute that obedience is given to his authority. Now though the rule is true, *viz.* "qui

5. Co. 99.

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(a) 1. Vent. 173. 2. Lev. 139.

(b) Hardres, 480.

(c) 2. Inst.

(d) 5. Co. 99.

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"*jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est*" (a); yet that must be understood where the Judge has a proper jurisdiction; but here the authority of the justice was limited by the act to grant his warrant in a particular case, of which he had no general jurisdiction, and he having made a void and an illegal warrant was therefore no proper judge of the matter, whose authority is no more to be obeyed than that of a stranger; for the rule also is, "*judicium non à suo judice datum nullius est momenti*." To make this yet more plain, suppose the justice had issued out his warrant directed to the defendant to levy five hundred pounds for this offence, or to take and imprison the offender during life, certainly he had been a trespasser if he had executed such a warrant. The statute gives power to the justice to convict, but does not make him a judge either to declare the forfeiture, or to levy it; so that his granting a warrant for that purpose is purely a ministerial act at the instance of the informer, who is to demand it after conviction, and if not paid, then to apply himself to the justice for his warrant to levy it. So that upon the face of this warrant the constable is left without excuse; for both the acts being therein recited, it is a sufficient direction for him to look into them; and to take care at his peril not to exceed his authority (b).

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SECONDLY, There are many other faults both in the warrant, and in the execution of it, *viz.* costs are awarded when in truth the party is to pay none till after commitment, and the defendant was not committed: so likewise the demand of the forfeiture ought to be previous to granting the warrant, but that does not appear; then it commands the defendant to demand it of *Crump* the plaintiff, and he demanded it of his wife, when it ought to have been personally of him, and no distress ought to have been made before such a personal demand; but these faults were not insisted on, only mentioned. The warrant therefore being illegal, and the defendant acting under it (though he was an officer), yet he is a trespasser.

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PEMBERTON, *Serjeant*, argued on the other side, *viz.* that the question was not whether the justice of peace had done well or not, nor whether his warrant was regular; but admitting it not to be well grounded upon the act, then the question will be, Whether the constable who is appointed to execute it is punishable for the mistake of the justice of the peace? Constables, bailiffs, and sheriffs, are always favoured by law in execution of their process; they have been encouraged by several acts of parliament, which direct them, when sued for any matter relating thereunto, that they should plead the general issue and give the special matter in evidence, and if they have a verdict, or the plaintiff in such suits is non-suited, they shall have treble damages (c). This seems highly reasonable, because the execution of process is the life of the law; and if men

(a) 9. Co. 76.

(b) 1. Stra. 711. 2. Stra. 1002.

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(c) 7. Jac. 1. c. 5. 21. Jac. 1. c. 12.

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should be prosecuted for any small mistake, it would obstruct the execution of justice by discouraging of officers, and by great delays in all proceedings, which must necessarily follow if the officer before he executes the process must advise whether it is legal or not. This question was long ago settled in the *Case of the Marshalsea* (a), there being then a solemn judgment given, that a subordinate officer shall be excused in the executing of an erroneous process, *quia parere necesse est*. It is true, there have been several questions since that judgment concerning the execution of process, all which depend upon this single point, viz. Whether the court out of which such process did issue had an original jurisdiction of the matter or cause? But it seems very hard that officers, who for the most part are illiterate persons, should take notice whether that court out of which the process issued has a jurisdiction of the matter or not; and therefore since that *Case of the Marshalsea*, all subsequent causes of that nature have been governed by that judgment. To instance in some, viz. In *Hilary Term* in the twenty second of *James the First*, an action of trespass was brought in this court, for taking the plaintiff's goods, &c. (b); * the defendant pleaded, that the *Earl of Southampton* was seised in fee, &c. and that he had a court-baron, &c. in which a plaint was levied, and a debt recovered against one *Britton*, and thereupon an attachment was awarded against him directed to the defendant, being a bailiff, who by virtue thereof took the goods out of the custody of the plaintiff, to whom they were fraudulently conveyed by *Britton*, on purpose to deceive his creditors; to this an exception was taken, because the process was irregular, viz. an attachment first, which cannot be in a court baron, for the process there is summons, attachment, and distress; yet it was held, that the court having an original jurisdiction of the matter, the mis-awarding of the process shall not make the officer guilty in executing of it. So where an action was brought in an inferior court (c), and a third person bound both his lands and goods by recognizance that the defendant should render his body, &c. or that he would pay the debt; and afterwards judgment was had against the defendant, and a precept in the nature of a *capias ad satisfaciendum* was directed to the bailiff, &c. to take the defendant; and if he was not to be found, then to take him who entered into the said recognizance; but notwithstanding that, and although one and the same *capias* would not lie against the principal and bail at the same time, and this appearing in the precept itself to be contrary to law, of which the officer might have taken notice, yet since that court had an original jurisdiction of the cause, he shall not be punished for obeying an illegal process. Likewise in *Sir Thomas Orby's Case* (d), who was high sheriff of *Lincoln*, and one *Hale* a justice of peace did, by virtue of the statute of 22. & 23. *Car. 2. c. 20.*

(a) *Hall v. Stanley*, 10. Co. 61.

(c) 2. Roll. Abr. 560.

(b) *Turberville v. Tipper*, 2. Roll. Rep. 493.

(d) S. C. *Id.* Ray. 3. cited, et libatur.

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discharge a prisoner who was in custody for a hundred pounds, though the discharge was illegal, yet, upon an escape brought against the sheriff in the common pleas, he was excused, because the justice of peace had a jurisdiction and authority by the statute to discharge a prisoner in such manner as is therein directed; and though he had exceeded his power, yet the sheriff is not to be punished. It appears therefore upon these authorities, and many more which might be cited, that when officers are punished for executing erroneous process, it is always where the court out of which it issues has not an original jurisdiction of the cause: so was the case of *Terry v. Huntington* (a) in the exchequer, mentioned on the other side, and so is *Nichol's Case* (b); the reason of the judgment in that last case was, because the churchwardens of one parish had no power to tax the inhabitants of another, and the justices are only to confirm lawful rates. It must therefore be agreed, that where the court has a jurisdiction, and acts illegally, the officer shall be excused: if so, the justice of peace had a jurisdiction in this case, and therefore the officer shall not be punished. And that he has a jurisdiction appears upon the frame and construction of this act; for *first*, it prohibits selling of wine in glass bottles; *secondly*, it imposes a forfeiture upon the seller after a time limited. It creates a *new offence*, and inflicts a penalty (c), but it gives the justices power to convict, and send out their warrants to levy it; so that they have cognizance of the cause.

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It must also be agreed, that an erroneous warrant of a justice, &c. is within the same reason with an illegal and void process of any court whatsoever; but when it is objected, that it is so when the warrant is general, but not where irregularities appear upon the face of it, as there are two in this warrant.

FIRST, It is to levy fifty shillings for every bottle, when all is but one offence.

SECONDLY, It is to levy the costs before the penalty.

As to THE FIRST, it does not appear that there is any irregularity in it, because by the very words and meaning of the act the defendant is to pay fifty shillings for every glass bottle in which he sold wine; and if he sell it in a hundred bottles to several people, those are several offences, and *non constat* but the eighteen bottles of wine for which he is convicted were so sold at several times, and not all at once. It is plain that it was the opinion of the justice that the offences were several; and it seems unreasonable that the constable should have power to controul his judgment; he is not to dispute but to submit.

Then as to *the costs*, it is likewise plain that they are given upon the conviction, and not upon the commitment of the offender; however, it is a little too nice to put the constable upon examining that matter.

(a) Moor, 480.

(c) See Stra. 1256.

(b) C. O. Car. 394.

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against
HALFORD.

* It has been said, that the statutes being recited in the warrant, and the defects appearing so plain therein, might be some intimation or direction to the constable to look into these laws: but admitting he does, he may not understand them; and the other side will scarce allow a constable to be a proper judge of an act of parliament (a).

The cause was adjourned; but the plaintiff dying no judgment was given in it.

(a) By 24. Geo. 2. c. 44. "No action shall be brought against any constable, &c. for any thing done in obedience to a warrant under the hand and seal of a justice of the peace until demand made by the party in writing of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and after such demand and compliance therewith, no action shall be brought against such constable, &c. without making the justice who signed or sealed the warrant defendant, and on producing and proving such warrant at the trial the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against the justice and constable, &c. then on proof of the warrant the jury shall find for such constable, notwithstanding such defect of jurisdiction as aforesaid, &c." See *Milward v. Cassin*, 2. Black. Rep. 1330.

Case 126.

Peers against Lucy.

Trinity Term, 6. Will. & Mary. Roll 178.

For fishing in
his several fish-
ery.

WARWICK } BE it remembered, that heretofore, to wit, to wit. } in the Term of *Easter* last past, before the lord the king and lady the queen, at *Westminster*, came *Thomas Peers, Esquire*, by *John Lilly* his attorney, and brought into the court of the said lord the king and lady the queen, then there, his certain bill against *George Lucy, Esquire, Edmund Lord, John Waterman, John Dickins, John Hawkes, junior, and Richard Perkins*, in the custody of the marshal, &c. of a plea of *trespass*, and there are pledges of prosecuting, to wit, *JOHN DOE* and *RICHARD ROE*, which said bill follows in these words: "WARWICK to wit. *Thomas Peers, Esq.* complains of *George Lucy, Esq. Edmund Lord, John Waterman, John Dickins, John Hawkes* the younger, and *Richard Perkins*, in the custody of the marshal, &c. for this, that they on the seventeenth day of *April*, in the sixth year of the reign of the lord and lady *William and Mary*, now king and queen of *England, &c.* with force and arms, &c. the clofe of him the said *Thomas Peers*, called *Cliffe Bank*, at the parish of *Alveston*, in the county of *Warwick* aforesaid, did break and enter, and the grafs of him the said *Thomas Peers*, in the same clofe then growing, to the value of forty shillings, with their feet by walking did tread down and consume; and likewise for this, that they afterwards, to wit, the same day and year aforesaid, at *D.* in the county aforesaid, and at divers other days and times between the said seventeenth day of *April* and the first day of *June* then next following, with force and arms, &c. in

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" in the several fishery of him the said *Thomas Peers*, in the river
 " of *Avon*, in the parish of *Alveston* aforesaid, in the county aforesaid, did fish, and from his fishery aforesaid, to wit, ten thousand
 " roaches, ten thousand dace, and twenty thousand gudgeons, to
 " the value of one hundred pounds, then and at the several times
 " aforesaid theré found, did take and carry away, and other outrages on him did then and there commit, against the peace of
 " the said lord and lady the now king and queen, and to the damage
 " of him the said *Thomas Peers* two hundred pounds. And therefore he produces the suit, &c."

Peers
against
Lucy.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity*, in this same Term, until which day the said *George Lucy*, *Edmund Lord*, *John Waterman*, *John Dickins*, *John Hawkes*, and *Richard Perkins*, had leave to imparl to the bill aforesaid, and then to answer, &c. before the lord the king and lady the queen at *Westminster*, cometh as weil the aforesaid *Thomas*, by his attorney aforesaid, as the aforesaid *George Lucy*, *Edmund Lord*, *John Waterman*, *John Dickins*, *John Hawkes*, and *Richard Perkins*, by *Charles Ballet* their attorney, and the said *George Lucy*, *Edmund Lord*, *John Waterman*, *John Dickins*, *John Hawkes*, and *Richard Perkins*, defend the force and injury when, &c.; and as to the force and arms, or any thing that is against the peace of the said lord and lady the now king and queen, and also the whole trespass aforesaid, except the breaking and entry of the close aforesaid, and the treading down and consumption of the grafs aforesaid with their feet by walking, in the declaration aforesaid above supposed to be committed, say, that they are not guilty thereof; and of this they put themselves on the country: and the said *Thomas* thereof likewise, &c. And as to the breaking and entry of the close aforesaid, and the treading down and consumption of the grafs aforesaid with their feet by walking, the same *George*, *Edmund*, *John*, *John*, *John*, and *Richard*, say, that the said *Thomas* ought not to have or maintain his action aforesaid thereof against them, because they say, that long before the said time when that trespass is supposed to be committed, to wit, on the first day of *December*, in the third year of the reign of the *Lord Edward the Sixth*, late King of England, &c. *John Earl of Warwick* was seised of and in the manor of *Bishop Hampton*, with the appurtenances, in the said county of *Warwick*, whereof one acre of land covered with water in the parish of *Alveston* aforesaid, in the county aforesaid, next and contiguously adjoining to the said close in which the trespass aforesaid is supposed to be committed, is, and at the said time when, &c. and also for time immemorial was, parcel in his demesne as of fee; and that the said late King *Edward the Sixth* then was seised of and in the close aforesaid in which, &c. in his demesne as of fee in the right of his crown of England; and that the said earl of the manor aforesaid, with the appurtenances whereof, &c. so as aforesaid being seised, the same earl, and all they whose estate the same earl then had of and in the manor aforesaid, with the appurtenances whereof, &c. have for time immemorial been used and accustomed to have the necessary easements following

As to part not
guilty.

As to the residue, that the *Earl of Warwick* was seised in fee of the manor of *Hampton*, whereof one acre of land covered with water is parcel;

that *Edward the Sixth* was seised of the close in which, &c.

Prescription to enter the close in which, &c. to fish.

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Præss
against
Lucy.

The Earl of
Warwick granted
the manor
whereof, &c. to
Edward the
Sixth, who en-
tered and died
seised,

whereby the
manor whereof,
&c. and the close
in which, &c.
descended to
Queen Mary,
&c.

Philip and Ma-
ry granted the
manor whereof,
&c. with all
ways, &c. to
Thomas Lucy in
fee.

for the catching of the fish being in the water aforesaid, to wit, by themselves and their servants from time to time, and at all seasonable times of fishing in the water aforesaid, at their will, into the close aforesaid in which, &c. to enter, and the nets and other engines necessary for the catching of the fish being in that water there near the banks of the water aforesaid to open, and into the water aforesaid to throw, and in that water and out of that water to draw, for the necessary catching of the fish being in the water aforesaid; and the said late King Edward the Sixth of the said close in which, &c. so as aforesaid being seised, and the said Earl of Warwick of the said manor with the appurtenances whereof, &c. in form aforesaid being seised, the same earl afterwards, and before the said time when, &c. to wit, on the twentieth day of December, in the third year of the reign of the said late king, at Westminster, in the county of Middlesex, by his certain indenture made between him the said earl of the one part, and the said late king of the other part, sealed with the seal of the said earl, and remaining inrolled on record in the court of chancery of the said lord and lady the now king and queen, at Westminster, in the county of Middlesex aforesaid, the date whereof is the same day and year, did grant to the said late king, among other things, the manor aforesaid, with the appurtenances whereof, &c. to have and to hold that manor, with the appurtenances whereof, &c. to the same late king, his heirs and successors, for ever: by virtue whereof the said late king into the said manor, with the appurtenances whereof, &c. entered, and was thereof seised in his demesne as of fee in the right of his crown of England; and the said late King Edward the Sixth being so thereof, and of the said close in which, &c. seised, afterwards, and long before the said time when, &c. at the parish of Alveston aforesaid, died so thereof seised, by whose death the said manor, with the appurtenances whereof, &c. and the close aforesaid in which, &c. descended to the Lady Mary, late Queen of England, &c. as sister and heir of the said late King Edward the Sixth, whereby the same late Queen Mary into the said manor, with the appurtenances whereof, &c. and into the said close in which, &c. entered, and was thereof seised in her demesne as of fee in the right of her crown of England; and so being thereof seised the same late Queen Mary, long before the said time when, &c. at the parish of Alveston aforesaid, took to husband Philip, then King of Spain, whereby the same Philip, as King of England, in the right of the said late queen, and the same late queen, were seised of and in the manor aforesaid, with the appurtenances whereof, &c. and the said close in which, &c. in their demesne as of fee in the right of their crown of England; and so being thereof seised, they the same late King Philip and the late Queen Mary afterwards, and before the said time when, &c. to wit, on the twelfth day of June, in the third and fourth year of their reign, at Westminster aforesaid, in the county of Middlesex aforesaid, by their letters patent sealed under the great seal of England, bearing date at Westminster aforesaid, the same day and year which the said defendants

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defendants here in court produce, granted to one *Thomas Lucy, Esq.* among other things, the said manor, with the appurtenances whereof, &c. and all and singular ways, commodities, emoluments, and hereditaments, in the said parish of *Bishop Hampton*, in the said county of *Warwick*, and elsewhere wheresoever in the same county, to the said manor of *Bishop Hampton* whereof, &c. or any parcel thereof, howsoever belonging or appertaining, or as member, part, or parcel, of the same manor whereof, &c. had, known, accepted, used, reputed, demised, or occupied, or with the same, or any part thereof, used or enjoyed, as fully, freely, and intirely, and in as ample manner and form as any person whatever then before ever had, held, or enjoyed, or ought to have, hold, or enjoy, the manor aforesaid, with the appurtenances whereof, &c. to have and to hold to the said *Thomas Lucy*, his heirs and assigns, for ever; by virtue whereof the same *Thomas Lucy* into the said manor, with the appurtenances whereof, &c. afterwards, and long before the said time when, &c. entered, and was thereof seised in his demesne as of fee; and the said *Thomas Lucy* of the manor aforesaid, with the appurtenances whereof, &c. being as aforesaid seised, the said *Thomas* afterwards, and long before the said time when, &c. at the parish of *Alveston* aforesaid died so thereof seised, by whose death the manor aforesaid, with the appurtenances whereof, &c. descended to one *Robert Lucy*, whereby the same *Robert* afterwards, and long before the said time when, &c. into the manor aforesaid, with the appurtenances whereof, &c. entered, and was thereof seised in his demesne as of fee; and the same *Robert* so of the manor aforesaid, with the appurtenances whereof, &c. being seised, the same *Robert* afterwards, and long before the said time when, &c. at the parish of *Alveston* aforesaid, died so thereof seised, without issue male from his body issuing, by whose death the manor aforesaid, with the appurtenances whereof, &c. descended to one *Bridget Lucy*, as only daughter and heir of the said *Robert Lucy*, whereby the same *Bridget* afterwards, and long before the said time when, &c. into the manor aforesaid, with the appurtenances whereof, &c. entered, and was thereof seised in her demesne as of fee; and the said *Bridget* so of the manor aforesaid, with the appurtenances whereof, &c. being seised, the same *Bridget* afterwards, and long before the said time when, &c. thereof enfeofed one *Richard Lucy*, the uncle of her the said *Bridget*, to have and to hold to the same *Richard*, his heirs and assigns, for ever, whereby the same *Richard* was seised of the manor aforesaid, with the appurtenances whereof, &c. in his demesne as of fee; and the said *Richard Lucy*, being so thereof seised, the same *Richard* afterwards, and long before the said time, &c. at the parish of *Alveston* aforesaid, died so thereof seised, by whose death the manor aforesaid, with the appurtenances whereof, &c. descended to one *Thomas Lucy, Esq.* as son and heir of the said *Richard Lucy*, whereby the same *Thomas Lucy* afterwards, and long before the said time when, &c. into the manor aforesaid, with the appurtenances whereof, &c. entered, and was thereof seised in his demesne as of fee; and the said *Thomas Lucy*, being so

Præsumptively
against
Lucy.

Thomas Lucy entered, and died seised.

Feoffment in fee.

Death of the feoffee.

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**Peers
against
Lucy.**

His heir entered,
and devised
the manor
whereof, &c. to
John Mordant,
&c. in fee.

John Mordant,
&c. enfeoff *Davenport Lucy*,
who died seised,
whereby the
manor whereof,
&c. descended to
the defendant
George, and he
in his own
right, the others
as his servants,
justify.

thereof seised, the same *Thomas Lucy* afterwards, and long before the said time when, &c. to wit, the day of in the year , in due form of law made his last will and testament in writing, and by the same devised the manor aforesaid, with the appurtenances whereof, &c. to *John Mordant, Robert Wheatley*, and *Edward Willee*, gent. their heirs and assigns, for ever; and afterwards, and long before the said time when, &c. the same *Thomas Lucy*, at the parish of *Alveston* aforesaid, died so as aforesaid seised; after whose death, and long before the said time when, &c. the said *John Mordant, Robert Wheatley*, and *Edward Willee*, by virtue of the devise aforesaid, into the manor aforesaid, with the appurtenances whereof, &c. entered, and were thereof seised in their demesne as of fee; and the said *John Mordant, Robert Wheatley*, and *Edward Willee*, being so thereof seised, the same *John Mordant, Robert Wheatley*, and *Edward Willee*, afterwards, and long before the said time when, &c. to wit, on the day of , in the year , thereof enfeoffed one *Davenport Lucy, Esq.* to have and to hold to the same *Davenport*, his heirs and assigns, for ever; by virtue whereof the same *Davenport* was seised of the manor aforesaid, with the appurtenances whereof, &c. in his demesne as of fee; and the said *Davenport* being so thereof seised, the same *Davenport* afterwards, and long before the said time when, &c. at the parish of *Alveston* aforesaid, died so thereof seised, without any issue of his body issuing, by whose death the manor aforesaid, with the appurtenances whereof, &c. descended to the said *George Lucy*, as brother and heir to the said *Davenport*, whereby the same *George* afterwards, and before the said time when, &c. into the manor aforesaid, with the appurtenances whereof, &c. entered, and was and yet is thereof seised in his demesne as of fee; wherefore the same *George* in his own right, and the said *George, Edmund, John, John, John*, and *Richard*, as servants of the said *George*, and by his command, at the said time when, &c. being a seasonable time of fishing in the water aforesaid, into the said close in which, &c. near the bank of the water aforesaid entered, and there the nets of the said *George*, for the necessary catching of the fish being in that water, opened, and into the water aforesaid threw, and in that water and out of that water drew, and thereby the grass aforesaid, in the same close then growing, with their feet by walking trod down and consumed, doing as little damage there as they could, as they lawfully might; which is the same breaking and entry of the close aforesaid in which, &c. and the treading down and consumption of the grass aforesaid there with their feet by walking, whereof the said *Thomas Peers* above thereof against them complains: and this, &c.

ED. NORTHEY.

Demurrer by
protesting that
George Lucy
was not seised
in fee, and that
the easement
was not a ne-
cessary one.

And the said *Thomas*, as to the said plea of them the said *George, Edmund, John, John, John*, and *Richard*, as to the breaking and entry of the close aforesaid, and the treading down and consumption of the grass aforesaid with their feet by walking, in manner and form above in pleading alledged, says, that he, by
any

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any thing by the said *George, Edmund, John, John, John, and Richard*, above in pleading alledged, ought not to be precluded from having his action aforesaid thereof against them, because by protesting that the said *George Lucy* was not seised of the said one acre of land covered with water, in the parish of *Alveston* aforesaid, in the county aforesaid, in his demesne as of fee ; and protesting likewise that the easement aforesaid, in the plea aforesaid abovementioned, is not a necessary easement for the catching of fish in the water aforesaid ; for plea nevertheless the same *Thomas* says, that the plea aforesaid by the said *George, Edmund, John, John, John, and Richard* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said *Thomas* from having his action aforesaid against them the said *George, Edmund, John, John, John, and Richard*, and that he to that plea in manner and form aforesaid pleaded hath no necessity, nor is by the law of the land obliged in any manner to answer : and this he is ready to verify : wherefore, for want of a sufficient answer in this behalf, the same *Thomas* prays judgment, and his damages by reason of that trespass to be adjudged to him, &c.

Peers
against
Lucy.

N. WRIGHT.

And the said *George, Edmund, John, John, John, and Richard*, Joinder. say, that the plea aforesaid, as to the breaking and entry of the close aforesaid, and the treading down and consumption of the grass aforesaid with their feet by walking, by them the said *George, Edmund, John, John, John, and Richard*, in manner and form aforesaid above in pleading alledged, and the matter in the same contained, are good and sufficient in law to preclude the said *Thomas* from having his action aforesaid against them the said *George, Edmund, John, John, John, and Richard*, which said plea, and the matter in the same contained, the same *George, Edmund, John, John, John, and Richard*, are ready to verify and prove, as the Court, &c. And because the said *Thomas* to that plea doth not answer, nor hitherto in anywise deny it, the same *George, Edmund, John, John, John, and Richard*, as before pray judgment, and that the said *T.* may be precluded from having his action aforesaid against them the said *George, Edmund, John, John, John, and Richard*, &c. But because the court of the lord and lady the king and queen now here are not yet advised to give their judgment of and upon the premises whereof the parties aforesaid have above put themselves on the judgment of the court, day therefore is given to the parties aforesaid before the lord and lady the king and queen at *Westminster*, until day next after to hear their judgment of and upon those premises, because the court of the lord and lady the king and queen now here thereof not yet, &c. And as well to try the issue aforesaid between the parties aforesaid above joined to be tried by the country as to inquire what damages the same *Thomas* hath sustained by reason of the trespass aforesaid, whereof the parties aforesaid have above put themselves on the judgment

Venue awarded
as well to try
the issue as to
inquire if, &c.

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Peers
against
Lucy.

judgment of the court, if judgment happens to be thereon given for the said *Thomas* against them the said *George, Edmund, John, John, John, and Richard*, let a jury thereon come before the lord and lady the king and queen at *Westminster*, on day next after and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Case 127.

Peers against Lucy and Others.

A man cannot prescribe to have a necessary easement in the lands of another person for himself and his servants to catch fish in his several fishery.

TRESPASS for the breaking and entering the close of the plaintiff, and treading down of his grafs, and fishing in his several fishery.

The defendants, as to the force and arms, plead *not guilty*; and as to the breaking and entering of the close, and treading the grafs, they say that *John Earl of Warwick*, in the third year of *Edward the Sixth*, was seised in fee of the manor of *Hampton*, whereof one acre covered with water was parcel, and likewise contiguous to the said close; that the said *Earl*, and all those whose estate he had in the same manor, time out of mind, were accustomed to have a necessary easement for themselves and servants to catch fish in the said water at several times, and for that purpose to enter into the said close and spread nets, &c.; that afterwards the said *Earl* granted this manor to *King Edward the Sixth* in fee, after whose death both the said manor and close descended to *Queen Mary* as his sister and heir, who married *Philip King of Spain*, and so they became seised thereof, &c. who by letters patents granted the said manor to *Thomas Lucy* in fee, with "all ways, emoluments, commodities, and hereditaments thereunto belonging, &c. in as full and ample manner as any person before had enjoyed the same," and so derives a title to himself from the said *Thomas Lucy*, and justifies in his own right; and the * other defendants, as his servants and by his command, for entering into the said close, and spreading of his nets, and casting them into the water for the necessary catching of fish, &c.

S. C. Lilly
Ent. 449.

* [363]

The plaintiff by *protestation* replies, that the defendant was not seised in fee of that one acre covered with water, and that the easement which he had pleaded was not a necessary easement for catching of fish; and then demurred generally to the plea.—The defendants joined in demurrer.

Those who argued for the plaintiff insisted, that this plea was not good, either as to the matter or form of pleading.

FIRST, As to the matter; for probably this prescription might have been good, if the defendant had derived to himself a title from the *Earl of Warwick*; but he being seised of the manor, and the king of the close, and having granted the manor to the king, the easement by this means was extinguished, because it is inconsistent for one

one person to have both a general and particular property in the same thing at the same time. Many cases were cited to prove that this *easement* was destroyed by unity of possession. As in trespass, where the defendant justified for a way belonging to his house in D. to go to a wood in C.; the plaintiff replied, that one N. in the time of King Richard the First, &c. was seised both of the land through which the defendant claimed the way, and likewise of the wood; and though in 3. Hen. 6. pl. 31. it was a question, Whether this way was extinguished by unity of possession; yet Brook, in abridging of the case (a), seems to be clear of opinion that it was extinguished. So unity of possession of a mill and water-course to which a way is appendant, and of that land over which the way is, will extinguish the way itself (b). So in the case of *Surry v. Piggot* (c), it was agreed that all private ways are extinguished by unity of possession; but when the thing is of necessity and essential to the grant, in such case, if there be once an unity of possession, it shall revive again; as if there be a water-course to a house through the ground of another person, that is of necessity, and shall not be extinguished by unity of possession. This is an *easement* in the nature of a way, and if a way can be extinguished, why not this? especially when it is not pleaded, that it was necessary for catching of fish; it is only said it was a necessary easement, &c. which is a very insignificant expression, it is neither a grammar word, or a word of art and skill; it should * have been, that they *consueverunt habere quandam viam* or *quoddam privilegium sine libertatem intrare*, &c. And though it is an insensible word, it cannot be rejected as *surplusage* upon the statute of Demurrers, because it is the gift of the action; but if that sentence should be rejected, then it is *non fuerunt et consueverunt clausum intrare*, which may be with leave. Neither is it revived by the grant of "all ways, emoluments, and hereditaments," &c. to Thomas Lucy, ancestor of the defendant, for the only word which may give any colour to such an opinion, is the word "hereditaments," but that must be intended only of such as were in being at the time of the grant made. To prove that it was not revived by such general words, the case of *Marshall v. Hunter* (d) was cited as an authority full to the purpose, which was thus, viz. A copyholder for life having common, &c. purchased the fee of his copyhold, which was granted to him by the lord *cum pertinentiis*, and it was resolved, that by the unity of possession his common was destroyed, and that it was not revived by these general words *cum pertinentiis*.

THE SECOND POINT was not much insisted on, which was, that the plea was insufficient as to the manner of pleading; for it is said that the *Earl of Warwick*, in the third year of Edward the Sixth, was seised in fee of the manor of Hampton, &c. and of

Petes
against
Lucy
AND OTHERS.

Ld. Ray. 406.
1400.

* [364]

(a) Bro. Abr. "Chemin" pl. 13. Latch, 153. Bendl. 174. 2. Sid. 39.
(b) Bro. Abr. "Nuisance" pl. 11. 111 S. P. Hob. 131. S. P.
1. Roll. Abr. 905. (d) Yelv. 187. 1. Brewnl. 173.
(c) 3. Bulst. 340. Poph. 166. Cro. Jac. 253. Cro. Eliz. 774. contra.
one

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against
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one acre of ground parcel thereof covered with water, and then prescribes that he and all those, &c. used to have a *necessary easement*, but does not say "*tanquam ad manerium præd. spectant.*" and therefore have not claimed it as an *easement* belonging to the manor.

10. Mod. 525.
2. Peer. Wms.
(604).
3. Peer. Wms.
9.

Those who argued *on the other side* agreed the cases before cited to be law, *viz.* where any matter of interest or charge is claimed upon men's estates, as rents, commons, &c. such are always extinguished by unity of possession, and never revived. But these cases do not come up to the matter now in question, because there is a great difference between matters of *charge* and *easement* in all cases, excepting only that of a *way*, which is of necessity; and this is the very difference made in all our books. Such were all the cases before mentioned on the behalf of the plaintiff, and such was the resolution in the case of *Surry v. Piggot*, where all the authorities are quoted, *viz.* It was an action on the case for stopping of a water-course which used to run from one place to another, and which * filled the pond of the plaintiff with water for the *necessary watering* of his cattle; there the water was held to be a *necessary easement*; and though there was a unity of possession, yet for that reason judgment was given, that the water-course was not extinct. The defendants in like manner, by pleading, have shewed this to be a *necessary easement*, and the plaintiff has confessed as much by his *demurrer*; for they have no way of catching fish but as set forth in this plea.

* [365]

SECONDLY, But if this *easement* was once extinguished by unity of possession, yet the grant of the king and queen *de novo* to *Thomas Lucy* revives it; for it is granted to him "*tam amplo modo et formâ prout aliqua persona quæcunq. antetunc manerium, &c. habuit,*" which are relative words, and give new life to this *easement*. As in *trespals (a)*, the defendant pleaded that *Bradshaw* was seised of the place *WHERE*, &c. in fee, and that *Folijambe* was seised of a house, and so prescribed to have common appurtenant in the place *WHERE*, &c. and that *Folijambe* made a feoffment of his house to *Bradshaw*, who made a lease thereof to the defendant with all commons thereunto appertaining, or occupied or used with the said house; and it was adjudged, that by the unity of possession the common was extinguished, yet by both those words a good grant was made of a new common. So where a copyhold messuage escheated to the lord *(b)*, where the copyholder had common by prescription in sixty acres of the demesnes, and the lord granted "all commons to the said messuage belonging or let with the same;" it was adjudged, that by these words the grantee had a common in the said sixty acres, though it was once destroyed by unity of possession.

(a) *Bradshaw v. Eyre*, Cro. Eliz. contra. Cro. Eliz. 794. 2. And. 161. 570. See also 1. Bac. Abr. 394. Hob. 131.

(b) 9. Co. 26. a. Cro. Jac. 253.

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As to the objection, that the words "*necessary easement*" are insignificant, and neither words of art or skill, that may receive this answer, *viz.* the word "*easement*" is known in the law; it is defined in the terms thereof; it is a *genus* to several species of liberties which one man may have in the soil of another, without claiming any interest in the land itself; it is used in *Gateward's Case (a)*, where it was held to be a good custom for an inhabitant of a certain parish to have a way over another man's ground, either to church or to the market, because it is an easement and no profit: it is used also by my Lord Hobart (*b*), who makes a difference between interests and profits, &c. such as *rents* and *commons*, &c. and *easements*, such as *lights*, *air*, &c. the last of which, though they may be destroyed or * extinguished for a time by unity of possession (for a man may do what he pleases with his own), yet if no alteration be made thereof when it is in one hand, upon the dividing it again, the interest and right to such easement revives. My Lord Dyer (*c*) uses this word where he tells us, that lessee for life or years, or tenant at will, or an inhabitant of a parish who is tenant at will, cannot prescribe to a common in their own names, because of the meanness of their estates and capacity, but they may prescribe to be exempted from *toll*, or to have a way to church over another man's ground, because such are only *easements*. It is a word also used in pleading in almost all the Books of Entries, as in *Coke (d)*, in *Robinson (e)*, in *Winch (f)*, in *Vidian (g)*, in *Herne (h)*, and it is mentioned also in *Brownlow (i)*.

PETTS
against
LUCY
AND OTHERS.

Ld. Ray. 75.

* [366]

Ld. Ray. 406.

494. 1015.

1134. 1188.

10. Mod. 158.

229. 302.

11. Mod. 53.

12. Mod. 35.

Stra. 909.

CURIA. The word "*easement*" is known in law, but here the thing itself is set forth, *viz.* to catch fish, &c. and certainly no instance can be given of a prescription for such a liberty by such a word or name.

Therefore the defendants were directed to set the prescription right, and try the merit of the cause.

(a) 6. Co. 52. See also Year Book
25. Edw. 4. pl. 29. Cro. Car. 429.

(b) Hob. 131.

(c) Dyer, 72. a.

(d) Co. Ent. 19.

(e) Robin. Ent. 12.

(f) Win. Ent. 46.

(g) Vid. Ent. 6. 28.

(h) Herne's Plead. 74.

(i) 2. Brownl. Rep. Can. 24.

The King and Queen *against* Armstrong.

Case 128.

A MOTION being made to reverse an outlawry in *treason*, there being a writ of error brought, and the error assigned, *viz.* that it does not appear where THE HUSTINGS were held, for it is "at a court of HUSTINGS, &c." omitting "*pro civitate LON-*
"DINI."

Outlawry in
TREASON re-
versed, because
said "at a court
"of hustings,"
and the words
"held for the
"city of London"
were omitted.

THE COURT inclined to reverse it for this error.

But

Michaelmas Term, 6. William & Mary, In B. R.

Outlawry in But one of the Judges objected, that there ought to be a *scire* treason may be reversed without *facias* to the lords mediate and immediate, before the outlawry should be reversed.

To which it was answered, that it was not necessary in treason, because the forfeitures do not belong to them, but to the king.

Dyer, 34.

2. Hale, P. C. 209.

Whereupon the outlawry was reversed.

Ld. Ray. 154. 10. Mod. 188. 357. 12. Mod. 544. 3. Bac. Abr. 777. 4. Bac. Abr. 418.

* [367]

Case 129.

* Anonymous.

A prohibition to spiritual court for calling a woman "whore," upon a suggestion that the words were actionable there by custom of the place.

A MOTION was made for a prohibition to the ecclesiastical court of London, for calling of a woman "whore," upon a suggestion that the words were actionable there by custom of the place.

But THE COURT would not grant a prohibition without oath made, that if any such words were spoken, it was in London and not elsewhere.

1. Ventr. 352.

1. Show. 131.

Farsell. 29. 8. Mod. 114. 10. Mod. 71. 439. 11. Mod. 48. 112. 140. 208. 12. Mod. 104.

231. 242. Ld. Ray. 103. 212. 711. 1101. 1136. 1187. Strange, 187. 471. 545. 823. 1100.

3. Com. Dig. "Courts" (C. 15.) 4. Bac. Abr. 245.

Case 130.

Rush against Tory.

If a bill be entered on a day before the cause of action, and error thereon brought, the record cannot be amended by the judgment.

IN a judgment upon a *mutuatus*, the bill appeared to be filed on a certain day, viz. "MEMORAND. quod die Veneris, &c. which day happened to be before the debt became due.

This was assigned for error, upon a writ of error brought to reverse this judgment.

And now the Court was moved in behalf of the plaintiff to make

THE MEMORANDUM of another day, so that it might agree with the judgment.

Cro. Jac. 561.

5. Mod. 286.

10. Mod. 340.

2. Barnes, 12.

18. 237. Fitzg. 193. 275. Ld. Ray. 182. 284. 408. 897. 977.

But it was denied.

Case 131.

Jones against the Earl of Bath.

The Court will not put off a trial at bar on the absence of a witness.

A TRIAL AT BAR was appointed in this cause on Wednesday the twelfth of November; and the day before the trial the plaintiff moved to put it off, because he wanted a witness to prove a deed.

THE COURT denied the motion.

On a trial at bar, if the party refuse to bring the writ, the Court will order the *Roll*.—8. Mod. 340.

Thereupon the next day the attorney refused to bring in the writ, it being only a contrivance of him to prevent a nonsuit.

But

Michaelmas Term, 6. William & Mary, In B. R.

BUT THE COURT ordered THE ROLL to be brought in, that they might take notice there was such a writ.

And the counsel of the defendant informed them that *Chief Justice HALE* had committed an attorney for the like practice, which was likewise done now.

An attorney shall be committed for not producing the writ on a trial at bar.

1. Com. Dig. "Attorney" (B. 14.). 1. Bac. Abr. 192. 2. Hawk. P. C. ch. 22. f. 11. 3. Mod. 110.

* [368]

* The King and Queen *against* St. John's College, in Oxford. Case 132.

UPON an *alias mandamus* to admit *Mr. King* to the place of a scholar in the college, being nominated thereto by the Mayor of Bristol, to whom the right of nomination *pro hac vice pleno jure* did appertain, upon the resignation of one *Baskerville*;

If the founder of a College, as of St. John's in Oxford, appoint a visitor, and direct that the College shall consist of a president and fifty scholars; forty-three to be named by schools in London, and seven by the City of Bristol; and on a vacancy, the City of Bristol nominates a scholar; the visitor cannot refuse to admit the nominee of the City; for until he is of the foundation the visitor has no jurisdiction over him; but after admission he may deprive him for misconduct, &c.

The substance of the return was, that the college was founded by *Sir Thomas White*; that the *Bishop of Winton* for the time being was the LOCAL VISITOR thereof; that *Baskerville* resigned; and that after the nomination of *Mr. King* by the Mayor of Bristol, the president of the said college and ten senior fellows thereof assembled to consider of his qualifications, and for that it was their opinion upon proof of several facts inconsistent with good manners and committed by *Mr. King*, he was by them refused as incapable of the scholarship, and therefore they admitted another.

IT WAS ARGUED in his behalf, that there was nothing in this return to hinder this Court from granting farther process to compel the college to admit *Mr. King*, because the reason of their refusal was not positive but general; and therefore it is impossible to try the falshood of it in a collateral action, because there is no fact returned. In some cases a general return has been held sufficient, but then it was fortified by something of credit, as the return in *Daniel Apleford's Case* (a), that he was convicted of "enormous crimes," and nothing in particular set forth; but because THE VISITOR had given sentence, therefore a *mandamus* was denied, which would not have been if the *mandamus* had been prayed before sentence. So if the high commission court by virtue of their letters patents had deprived a minister for "divers contempts" to his ordinary, not shewing any in particular; this has been held good (b), because, before the statute of 1. Eliz. c. 1. which first gave them authority, the king might grant commissions to persons to proceed according to the ecclesiastical law, and they having proceeded against a spiritual person, and by an ecclesiastical censure, though not according to the statute, the Court will give credit to their sentence without shewing a particular cause. * The return is, that having refused *Mr. King* they chose another, and before the first writ of *mandamus* came to them, they admitted the person

S. C. ante, 260. S. C. Comb, 238. S. C. Holt, 437. Skin. 13. 5. Mod. 422. 10. Mod. 50. 1. Vezey, 78. 462.

* [369]

3 Atk. 662. Ld. Ray. 1334. 1345. Sira. 159. 557. 797. 1. Burr. 159. 2. Sira. 1082. 2152. 2. Bl. Rep. 51. 2. Term Rep. 290. 6. Com. Dig. "Visitor" (A. 15). et seq.

(a) 1. Mod. 82.

(b) 2. Roll. Abr. 113. 218.

Michaelmas Term, 6. William & Mary, In B. R.

THE KING
AND QUEEN
against
ST. JOHN'S
COLLEGE IN
OXFORD.

so chosen; but if *Mr. King* was refused without cause, they had no power either to choose or admit another; that part of the return which concerns the LOCAL VISITOR, viz. "That if *Mr. King* has any wrong done him he may appeal to THE VISITOR," and therefore this Court should not interpose until his sentence is given, is very immaterial; for though probably the right may be within the jurisdiction of THE VISITOR, yet this Court may compel an admittance to entitle the person to a right, for till then he has none, and therefore it cannot be reasonable to send him to THE VISITOR. But he has no jurisdiction in this case for two reasons.

FIRST, Because he is only a private judge appointed by the founder, or the law, to determine offences against the laws of the college or place where he is VISITOR, so that his power extends only over *collegiate persons* and things; but *Mr. King* is not of the college before admittance.

SECONDLY, His power is also to determine rights upon the statutes of the college, but not upon grants, which must be tried at the common law (a); and the question here arises upon the grant of THE FOUNDER to the *City of Bristol*. If there be any cause or truth in this return, the college may turn him out after he is admitted, for the very same reasons they now refuse to admit him; but if he is not to be admitted at all, then the right of the *City of Bristol* is wholly defeated. It is as reasonable that this Court should grant a *mandamus* to the college to admit persons, as to grant such writs to *corporations*, or to a *particular company* to make man free thereof, or to the *ordinary* to compel him to grant administration to the next of kin; for where the cases are alike, the remedies should also concur.

Adjournatur (b).

(a) See Cowp. 378.

(b) In the report of this case on the motion for the *alias mandamus*, Comb. 238. Holt, Chief Justice, is made to say, "the visitor shall determine all that relates to persons who are of the found-

ation, but here is a collateral interest in the city of *Bristol*; they are no part of the college, and THE VISITOR has no power before a person is made a member."

* [370]
Case 133.

* The King and Queen against Lawrence.

Error in a record
of High Treason.
Ld. R. y. 215.
548. 710. 926.
2037. 1305.
1. Fear Wms.
622.

THIS was a writ of error to reverse an attainder, &c.

The error assigned was, viz. the enquiry is on the behalf of the king for the county, &c. and they are severed in the judgment, which was, *pro domino rege et pro corpore com.*

It should have been, *pro domino rege pro corpore comitatús*, and the particle "et" should have been omitted.

For which cause it was reversed.

HILARY

HILARY TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench:

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

Sir Samuel Eyres, Knt.

} *Justices.*

Sir Edward Ward, Knt. Attorney General.

Sir Thomas Trevor, Knt. Solicitor General.

* *Cradock against Radford.*

* [371]

Case 1344

A JUDGMENT of twenty years standing came this Term to be revived by *scire facias* against the heir and tenants: It was, "*quod præd. THOMAS recuperet,*" instead of "*præd. ARTHURUS.*"

A judgment
"that the
"aforesaid
"Thomas
"recover, &c."

It was prayed that THE ROLL might be brought into court and amended, because it was only the fault of the clerk. The like amendment was in the common pleas in *Michaelmas Term 33. Eliz.* where the judgment was, "*quod idem JOHANNES sit in misericordia dii*" instead of *Thomas (a)*. So where the judgment was, "*quod præd. GEORGIUS capiatur,*" and it should have been *Elias (b)*; for where the parties are named right in the record, and the name of one of them misplaced or mistaken for the other, it is reasonable that the record should be amended, to entitle the plaintiff to an honest debt. It has been ruled to be amended in a much stronger case, *viz.* the misprision of the clerk has been in the very point

instead of the
"aforesaid
"Arthur,"
amended by
THE ROLL,
although of
twenty years
standing.

1. Ro. Abr. 203.
Hob. 347.
12. Mod. 384.
Stra. 1132.
1156. 1182.
1. Bac. Abr.
105; 106.

(a) *Lewes v. Háy*, Cro. Eliz. 299.—
See also *Wolf v. Stepney*, Cro. Eliz. 864;
Pelham v. Heming, Cro. Car. 594.;
and 1. Roll. Abr. 201.

(b) *Skarning v. Shartwell*, Cro. Eliz.

609. But in this case it was held not amendable, because it is part of the judgment, and the act of the Court. But see the 16. & 17. Car. 2. c. 8. and the 4. & 5. Ann. c. 16.

Hilary Term, 6. William & Mary, In B. R.

CRADOCK
against
RADFORD.
* [372]

of the judgment (a) ; as in ejectment the plaintiff had a verdict for a messuage, ten acres of meadow, and thirteen of pasture ; now there was no land in the verdict, and less * meadow and pasture than in the judgment, yet it was amended upon the statute (b) ; for the verdict is to guide the judgment, and so it ought to have been entered accordingly.

Ld. Ray. 95.
116. 134. 310.
511. 565. 669.
683, 897.

BUT on the other side this was opposed, for that it was not amendable, being an error in judgment, which must be imputed the act of the Court, and not of the clerk ; as where a *capiat* is entered instead of *misericordia*, or *concessum est per Curiam* instead of *consideratum est*, for these are erroneous in point of law ; and the very same case with this was held not to be amendable in *Easter Term* in the fortieth year of *Elizabeth* (c). So where the judgment was, “ *quod querens recuperet one hundred pounds per juratores assess.* ” and five pounds *pro mis. per jurat. hic de incremento adjudicat.* ” when it should have been “ *per Curiam* ; ” it was not amended (d), because it was the fault of the Court in the judgment itself.

But upon the reason of the authorities cited for the amendment, THE COURT ruled this should be amended, which was done accordingly.

(a) *Mason v Fox and Others*, Cro. Jac. 632. Palm. 258. 1. Roll. Abr. 201.

(c) Cro. Eliz. 609.

(d) *Harecourt v. Bishop*, Cro. Eliz. 497.

(b) 8 *Hm.* 6. c. 12.

Case 135.

Curry against Stephenson.

Hilary Term, 1693. Roll 37.

Indebitatus assumpsit for money due to the plaintiff as administratrix.

EBOR. } MEMORANDUM quod die Martis prox. post Octab.
ss. } *Janetii Hillarii isto eodem termino coram domino rege et*
domina regina apud Westm. venerunt WILLIELMUS CURRY et ANNA
uxor ejus administratrix omnium et singulor. bonorum et catallorum
jur. et creditorum quæ fuer. CHRISTOFERI JACKSON defuncti. tem-
pore mortis suæ qui obiit intestat. per WILLIELMUM BLACKALLER
attorn. suum, et protulerunt hic in curia dictorum domini regis et do-
minæ reginæ tunc ibidem quandam billam suam versus JOHANNEM
STEPHENSON in custod. mar. &c. de placito transgr. super casum ; et
sunt pleg. de prof. scilicet JOHANNES DOE et RICHARDUS ROE ; quæ
quidem billa sequitur in hæc verba, ss. EBOR. ss. WILLIELMUS CUR-
RY et ANNE uxor ejus administratrix omnium et singulorum bonorum
et catallorum jur. et creditorum quæ fuer. CHRISTOFERI JACKSON
defuncti. tempore mortis suæ qui obiit intestat. queruntur de JOHAN-
*NE STEPHENSON in custod. mar. marescb. domini regis et * domine*
reginæ coram ipsis rege et regina existen. pro eo videlicet quod cum
præd. JOHANNES, primo die Augusti anno regni DOMINI WILLIEL.
et DOMINÆ Mariæ nunc regis et reginæ Angliæ &c. quarto, apud
BEEDALL in com. præd. indebitat. fuisset eisdem WILLIELMO et
ANNÆ, ut administratrici bonorum et catallorum præfat. CHRISTO-

* [373]

FERI

Hilary Term, 6. William & Mary, In B. R.

FERI in 25l. legalis monetæ Angliæ pro tant. denariorum summa per ipsum JOHANNEM ad usum præfat. WILLIELMI et ANNÆ ut administratricis bonorum et catallorum dicti CHRISTOFERI ante tempus ill. habit. et recept. et sic indebituit. existen. præd. JOHANNES in consideratione inde super se assumpsit, et eisdem WILLIELMO et ANNÆ adiunc et ibidem fideliter promisit quod ipse idem JOHANNES præd. 25l. præfat. WILLIELMO et ANNÆ, cum inde postea requisit. esset bene et fideliter solvere et contentare vellet; præd. tamen JOHAN. promission. et assumption. suas præd. in forma præ l. fact. minime curans sed machinan. et fraudulentè intendens ipsos WILLIELMUM et ANNAM in hac parte callide et subdole decipere et defraudare præd. 25l. seu aliquem inde denarium præfat. WILLIELMO et ANNÆ (cui quidem ANNÆ administratio omnium et singularum bonorum et catallorum jur. et creditorum quæ fuerunt præd. CHRISTOFERI tempore mortis suæ per RICHARDUM STERNE artium magistrum jaccat. reverendissimi in Christo patris et domini JOHANNIS providentia divina EBORUM archiepiscopi Angliæ primat. et metropolitan. legitime fulcit. cui commissio administratio. ill. in hac parte de jure pertinuit 29 die Julii anno quarto supradicto apud BEEDALL præd. in com. prædicti. debito modo commissæ fuit) licet sæpius requisit. non solvit nec eis pro eisdem aliqualiiter contentavit sed ill. eis hucusque solvere omnino recusavit et adhuc recusat; unde præd. WILLIELMUS et ANNA dicunt quod deteriorat. sunt et damnum habent ad valenc. 40l. et inde producunt sectam &c. et profer. hic in curia iidem WILLIELMUS et ANNA literas administrator. præd. quæ commission. administrationis præd. eidem ANNÆ in forma præd. testantur, &c.

CURRY
against
STEPHENSON.

For so much by the defendant to the use of the plaintiff, as administrator to J. S. had and received.

Administration
committed to
one of the
plaintiffs.

Proferunt in
curia literas
administratorias.

Et præd. JOHANNES STEPHENSON, per NICHOLAUM HARDING attorn. suum, venit et defend. vim et injur. quando &c. et dicit quod præd. WILLIELMUS et ANNA action. suam præd. inde versus eum habere seu manutenere non debent, quia dicit quod billa ipsorum WILLIELMI et ANNÆ primo exhibita fuit 23 die Januarii anno regni domini et dominæ WILLIELMI et MARIÆ nunc regis et reginæ Angliæ &c. quinto et non antea, * quodque causa actionis præd. in narratione præd. mentionat. non accrevit præfat. WILLIELMO et ANNÆ ad aliquod tempus infra sex annos et nonaginta un. dies prox. ante diem exhibitionis billæ præfat. WILLIELMI et ANNÆ modo et forma prout iidem WILLIELMUS et ANNA superius inde versus eum queruntur: et hic parat. est verificare; unde petit judicium si præd. WILLIELMUS et ANNA actionem suam præd. inde versus eum habere seu manutenere debeant, &c.

The defendant
pleads, that
cause actionis
was accrevit
infra sex annos
et 91 dies præd.
ante exhibit.
billæ.

* [374]

Et præd. WILLIELMUS et ANNA dicunt quod ipsi per aliqua per præd. JOHANNEM superius plac. tando allegat. ab actione sua præd. inde versus eum habend. præcludi non debent, quia dicunt quod præd. CHRISTOFERUS JACKSON, in narratione præd. superius nominat. apud BEEDALL præd. primo die Aprilis anno regni DOMINI JACOBI SECUNDI nuper regis Angliæ, &c. secundo obiit intestat. quodque administratio bonorum et catallorum jurium et creditorum quæ fuerunt prædicti CHRISTOFERI tempore mortis suæ non fuit commissæ alicui personæ cuiusque præd. 29 diem Julii anni regni

The plaintiff
reply, that the
intestate died 1.
Apr. 2. Jac. 2.

Hilary Term, 6. William & Mary, In B. R.

CURRY
against
STEPHENSON.

dictorum domini regis et dominæ reginæ nunc quart. suprad. quo die administratio omnium et singulorum bonorum et catal. jurium et creditor. quæ fuer. præd. CHRISTOFERI tempore mortis suæ per præfat. RICHARDUM STERNE artium magistrum saccar. reverendissimi in Christo patris et domini JOHANNIS providentia divina EBORUM archiepiscopi Angliæ primat. et metropolitan. legitime fulcit. cui commissio administrationis ill. in hac parte de jure pertin. apud BEEDALL præd. eidem ANNÆ tunc et adhuc uxor. ipsius WILLIELMI CURRY primo commissæ fuit; et sic iidem WILLIELMUS et ANNAdicunt quod causa actionis præd. in narratione præd. mentionat. primo accrevit eisdem WILLIELLO et ANNÆ infra sex annos prox. ante diem exhibitionis billæ ipsorum WILLIELMI et ANNÆ præd. scilicet præd. vicesimo nono die Julii anno quarto supradictio apud BEEDALL præd.; et hoc pet. quod inquiretur per patriam.

Et prædict. JOHANNES STEPHENSON dic. quod placitum præd. per ipsos WILLIELMUM et ANNAM modo et forma præd. superius replicando placitat. materieque in eodem content. minus sufficiens in lege existunt ad ipsos WILLIELMUM et ANNAM ad action. suam præd. inde versus ipsum JOHANNEM habend. manutenend. ad quod idem JOHANNES necesse non habet, neque per legem terræ tenetur aliquo modo respondere; et hoc paratus est verificare; unde pro defectu sufficiens. replication. * in hac parte idem JOHANNES ut prius pet. judicium; et quæd præd. WILLIELMUS et ANNA ab actione sua præd. inde versus ipsum JOHANNEM habend. præcludantur &c. Et pro causis morationis in lege super placito illo idem JOHANNES secundum formam statut. in hujusmodi casu nuper edit. et provis. ostendit et cur. hic demonstrat has causas subsequen. VIZ. eo quod placitum ill. superius replicando placitat. non manutinet narration. præd. sed recedit ab eadem, et est argumentativum, incertum, duplex in se, repugnans, et carit forma, &c.

Et præd. WILLIELMUS et ANNA dicunt quod placitum prædict. per ipsos WILLIELMUM et ANNAM modo et forma præd. superius replicando placitat. materieque in eodem content. bon. et sufficiens. in lege existunt ad ipsos WILLIELMUM et ANNAM ad action. suam præd. inde versus ipsum JOHANNEM habend. manutenend. quod quidem placitum materieque in eodem content. ipsi iidem JOHANNES et ANNA perati sunt verificare et probare prout cur. &c. Et quia præd. JOHANNES ad placitum ill. non respondet nec ill. hucusque aliqualis. dedic. ipsi iidem WILLIELMUS et ANNA pet. judicium et damna sua occasione præmiss. præd. sibi adjudicari &c. Sed quia cur. dictor. domini regis et dominæ reginæ nunc hic de judicio suo de et super præmissis redd. nd. nondum advisatur, dies inde autus est partibus præd. coram domino rege et domina regina apud Westm. usque diem Mercur. prox. post Quinden. Paschæ de judicio suo de et super præmiss. ill. audiend. eo quod cur. dictor. domini regis et dominæ reginæ nunc hic inde rendum, &c. (Et sic continuat usque diem Martis prox. post tres Mich.) Ad quem diem coram domino rege et domina regina apud Westm. venerunt partes præd. per attorn. suos præd. Sed quia cur. dictor. domini regis et dominæ reginæ nunc de judicio suo de et super præmissis

Continuances.

Hilary Term, 6. William & Mary. In B. R.

*missis reddend. nondum advisatur, dies inde datus est partibus præd. coram domino rege et domina regina apud Westm. usque diem Mercur. prox. post Oâ. Hill. ante quem diem dicta domina MARIA regina diem suum clausit extremum. Ad quem diem coram domino REGE WILLIELMO TERTIO apud Westm. venerunt partes præd. per attorn. suos præd. super quo v. s. et per cur. dicti domini regis nunc hic plenius intellectis omnibus et singulis præmiss. maturaque deliberation. superind. habita videtur cur. dicti domini regis nunc hic quod placitum præd. per ipsos WILLIELMUM et ANNAM ux. ejus superius modo et forma præd. superius replicando placitat. * materiaque in eodem content. minus sufficiens. in lege exist. ad ipsos WILLIELMUM et ANNAM ad actionem suam præd. inde versus ipsum JOHANNEM habend. manutenen. Ideo consideratum est quod præd. WILLIELMUS et ANNA nihil capiant per billam suam præd. sed pro falso clam. suo sint inde in misericordia, &c. et præd. JOHANNES eat inde sine die, &c.*

CURRY
against
STEPHENSON.
D ath of the
queen.

* [376]
Judgment for
the plaintiff.
Nil cap. per billam.

Curry and his Wife against Stephenson.

Cafe 136.

THE PLAINTIFF William Curry and Anne his wife as administratrix of one Jackson, brought an action on the case against the defendant, in which they declared, that the defendant was indebted to them in the sum of twenty-five pounds for so much money received by him for the use of the said Ann, as administratrix, &c. and being so indebted, promised to pay it, &c.

An administrator is not bound by 21. Jac. 1. c. 16. until six years after administration granted.

The defendant pleaded, *quod causa actionis non accrevit infra sex annos prox. ante exhibitionem billæ.*

S. C. Skin. 555.
S. C. Salk. 421.
Cro. Jac. 60.
Ld. Ray. 838.
2. Stra. 907.
3. Bac. Abr.
514, 515.

The plaintiff replied, that administration was granted *prout* in the declaration, so that the cause of action did arise within six years, &c.

But the replication concluded to *the country*; and upon a demurrer, and joinder in demurrer, judgment was given for the defendant; because the plaintiffs should have *averred* their replication, and not have made that conclusion, for by that means the defendant had no opportunity to answer it.

A replication to non assumpsit infra sex annos, must conclude with an averment, and not to

the country. S. C. Carth. 337. 5. Com. Dig. "Pleader" (E. 32.).

IT WAS ALSO OBJECTED, that the plaintiffs had not well entitled themselves to this action, because it was not in the right of the man, but of his wife as administratrix.

In assumpsit by husband, and wife as administratrix; a declaration stating that the money was received to the use of the said husband, and wife as administratrix, is good.

But to that it was answered, that the precedents and authorities were otherwise; for in *Hilary Term* in the third year of William the Third an administrator brought an action against an executor, and declared in an *indebitatus assumpsit* for so much money by the testator for the use of the plaintiff, *ut administrator*, had and received; and judgment was affirmed upon a writ of error in this court.

S. C. Comb. 311. Cro. Eliz. 112. 537. Latch. 212.

To trespass for taking a mare, a JUSTIFICATION under the lord of a manor, stating that he and all those, &c. *semper habuerunt curiam legalem* for the manor, &c. and that the taking was by process from the said court, is good.

S. C. Skin. 587.
S. C. Holt, 554.

TRESPASS for taking of a mare, &c. The defendant as to the force, &c. pleaded *not guilty*, and as to the rest he justified, viz. That before the trespass, &c. Sir John Smith was seised in fee of the manor of *Bedminster* in the county of *Somerset*, &c. and that he and all those whose estate he had in the said manor *semper habuerunt curiam legalem* held for the same manor twice in a year, to which court such persons who were tenants of the said manor used to resort; that such also who had a right of common there the steward did usually appoint to be of the jury; that bye-laws were accustomed to be made there; and that all such persons who have common, &c. did obey those laws, or pay a forfeiture of a reasonable sum to be imposed on them, &c.; that at a court of the lord of the said manor, held there upon reasonable warning, a jury was sworn, and a law made, that every person who had common there should pay forty shillings for depasturing his cattle, where any corn was standing or growing within the manor; that the plaintiff held forty acres of land of the said manor, and so he had right of common there; that a ground called *Knowles Knapp*, in the manor, was sowed with corn; that the plaintiff permitted his sheep to depasture in the said corn; that this offence was presented at the next court, &c.; and that the defendant *ballivus domini manerii præd.* did take the said mare for the forfeiture, &c.

Upon a demurrer to this plea several objections were made.

FIRST, That there cannot be a *lawful court* to which the tenants used to resort; if it had been *curia legalis* generally, it might have been good. But this objection was not much insisted on, it being very immaterial, and only mentioned.

In trespass for taking a mare, a justification that the plaintiff was presented at the manor court, and that he the defendant took the mare, as bailiff of the lord of the manor, for a forfeiture, &c. is not sufficient; for he ought to shew the *special authority* under which he acted.—Co. Lit. 283. 303. 3. Lev. 20. 1. Roll. Abr. 310. 3. Mod. 138. Ld. Ray. 1530. 3. Term Rep. 183. 5. Com. Dig. "Pleader" (3. K. 14.). (3. M. 24.).

* SECONDLY, The justification was by virtue of an authority which the defendant had not sufficiently set forth; for it is "*tanquam ballivus domini, &c.*" which is very uncertain, for he may be his bailiff of another manor: he should have set forth a *precept* and *mandate* directed to him (a), and that he "*tanquam ballivus domini manerii sui præd.*" did take the mare, &c.

But on the other side it was said, that the defendant need not shew any authority; as where a tenant in *antient demesne* of the village of *Lastoff* prescribed to be exempted from toll throughout the realm (b), and brought an action against one for the taking of his

(a) Rastal's Entries, 445. b. 606.
Brownl. Prec. 181. Co. Ent. 666.

(b) Ward v. Knight, Cro. Eliz. 227.
S. C. more fully reported 1. Leon. 231.

Hilary Term, 6. William & Mary, In B. R.

goods at *Yarmouth*, and he justified that it was an antient town, &c. and prescribed to have toll of the tenants of *Lastoff*, and shewed for what, and the sum demanded, and that the same being refused to be paid he distrained; and it was objected, that the defendant had not set forth any authority in himself to demand the toll; and the taking of it being against common right, he ought for that reason to shew an expresse power; yet notwithstanding this objection the defendant had judgment (a).

LAMB
against
MILLS.

CURIA. There is a great difference between the taking of toll and the distraining for a penalty incurred as a forfeiture upon the breach of a bye-law, because in the latter case it is the presentment of the jury which makes the duty. If this had been in replevin, *tanquam ballivus domini*, or *per mandatum*, &c. it had been good: but in trespass a particular power and authority must be set forth (b); for the bailiff cannot take a forfeiture *ex officio*; there must be a precept directed to him for that purpose, which he must shew in pleading; and it is not sufficient to say that he took it *per mandatum* &c. In trespass the defendant justified the taking *per mandatum* of the sheriff, and this was held not good in the case of *Matthews v. Carey* (c) in this court.

Whereupon judgment, in this case, was given for the plaintiff.

(a) **CROKER**, in reporting this case, says, that judgment was given for the defendant, not on the form of the pleadings but on the substance of the matter; for that the Judges agreed, that there is no reason why tenants in ancient demesne should be discharged for merchandise, *Cro. Eliz.* 227. And with this *S. C.* 1. *Leon.* 233. agrees. For this privilege does not extend to tenants in ancient demesne, who are merchants and get their

living by buying and selling, *Fitz. N. B.* 228.; but is annexed to the person only in respect to the land, and to those things which grow and are the produce of the land. 2. *Leon.* 191. 2. *Inst.* 221. 2. *Bac. Abr.* 459.

(b) *Largford v. Webber*, 13. *Mod.* 132. *S. C. Carth.* 9. *S. C.* 3. *Salk.* 356.

(c) *Matthews v. Carey*, 1. *Salk.* 107. *S. C.* 1. *Show.* 61. *S. C.* 3. *Mod.* 137.

Roop against Scritch.

* [379]
Case 138.

IN AN ACTION OF TRESPASS several trespasses were set forth, and the defendant was found not guilty as to all but one, which was *pedibus ambulando*, and the damages five shillings and no more.

* This cause began originally in an inferior court, and was removed hither.

And **THE COURT** allowed full costs, though the damages were so small: **QUOD NOTA** (a).

inferior court.—2. *Lev.* 124. 8. *Mod.* 371. 10. *Mod.* 198. *Gilb. E. B.* 195. 199. *Ld. Ray.* 182. 395. 566. 1444. *Fitzg.* 42. *Str.* 192. 534. 551. 577. 624. 633. 645. 726.

(a) In the case of *Gavel v. Scudamore*, in Hilary Term the 27. *Car.* 2. a distinction is made, that where the cause is removed from an inferior court by the defendant, the plaintiff shall have full costs, without a certificate under 22. & 23. *Car.* 2. c. 9. f. 149. although the damages are under forty shillings, but not where it is removed by the plaintiff,

2. *Lev.* 124. and this distinction is followed in the case of *The Archbishop of Canterbury v. Fuller*, 1. *Ld. Ray.* 395. *Cook v. Beale*, 3. *Salk.* 115. But see 1. *Freem.* 374. 7. *Mod.* 129. *Gilb. Hist. C. P.* 270. 3. *Com. Dig.* 8vo. 236. 1. *Bac. Abr.* 514. *Hullock on Costs*, 445. *Bull. N. P.* 330.

The 22. & 23. *Car.* 2. c. 9. f. 149. which gives no more costs than damages, when under 40s. does not extend to trespass originally commenced in an inferior court.

Hilary Term, 6. William & Mary, In B. R.

Case 139. The King and Queen *against* Buggs.

AN indictment will not lie at their sessions upon the statute of 2. & 3. *Philip & Mary* c. 11. he being a clothworker, and not living in a city, borough, or town-corporate, and yet keeping in his house more than one woollen loom, by reason whereof he had forfeited forty shillings *per* week.

S. C. Skin. 428.

S. C. Comb. 252.

Ante, 51.

Cro. Eliz. 87.

601.

9. Co. 118.

2. Salk. 680.

5. Mod. 149.

12. Mod. 223.

314.

4. Com. Dig. 8vo. 528. Ld. Ray. 372. 872. Stra. 1256.

AN exception was taken to this indictment, for that the justices had not power to take it before them; for they cannot by law hold cognizance of pleas upon *penal statutes*, without an express power given them by these acts.

And here being no such authority allowed by this act, the indictment was for that reason quashed.

Case 140.

Roberts *against* Cook,

THE COURT will stay proceedings in ejectment until the costs of a former ejectment be paid, even when the plaintiff was nonsuited in the first action.

Comb. 110.

Salk. 255.

1. Stra. 548.

681. 697.

2. Stra. 1206.

1. Ld. Ray. 697.

1. Wilk. 266. 1. Term Rep. 492. Runn. Eject. 144. 2. Bl. Rep. 1158. And see Hullock on Costs, 445, to 467.; and 5. Com. Dig. "Pleader" (2. Z. 4.) where all the cases on this subject are collected.

AN EJECTMENT was brought in the common pleas, and a verdict for the plaintiff, but he had no costs; and now the defendant in that action brought a new ejectment in the court of king's bench against the same plaintiff.

SIR FRANCIS WINNINGTON moved, that he might have his costs before he should be compelled to plead to the new action.

But it was not granted, because he had no vexation, the verdict being for him. But if it had been against him, or he had been nonsuited, he should not have brought another action before the costs of the first had been paid, because it was a vexation to bring a new action.

Case 141.

Kiffin *against* Willis and Evans.

A release to one defendant of all actions, &c. will discharge a co-defendant in *trover*.

TROVER was brought against two defendants; one pleaded *not guilty*, and a verdict against him: the other pleaded a release of "all actions, &c." and had a verdict for him.

* SIR WILLIAM WILLIAMS moved for judgment against the other defendant who was found *guilty*.

* [380]

But it was denied, because the *trover* being joint, a release of all actions discharged both.

S. C. Comb. 316.

2. Roll. Abr.

412. 10. Mod. 251. 12. Mod. 101. 320. 550. Ld. Ray. 601. 717. 1203. 1372. 4. Bac. Abr.

282. — *Vide* the Preface to Hobart's Reports, in Cook v. Jennour.

IN EJECTMENT upon the demise of *Lucretia Tippin*, a special verdict was found to this purpose.

That *Edward Cofon*, being seised in fee of the lands in question, did, in the year 1636, in consideration of a marriage then intended to be had between him and *Frances Try*, and of a thousand pounds portion, &c. make a feoffment in fee to the use of himself and his heirs, until the said marriage should take effect, and afterwards to *Frances* his intended wife for life; then to trustees and their heirs during the life of *Edward*, to support contingent remainders; then to the first, second, &c. and so to the tenth son of his body in tail male; then to the heirs males he should have by any other wife; and for want of such issue, then to the heirs of the body of the said *Edward*; and for want of such issue then to his own right heirs. In which deed there was a covenant to levy A FINE, which was levied accordingly to the said trustees to the uses aforesaid. The marriage took effect; and *Edward* had issue by the said *Frances*, an only daughter named *Elizabeth*, who married *George Tippin*, by whom she had issue *Lucretia Tippin* the now lessor of the plaintiff. *Elizabeth* dying in the life-time of *Edward Cofon* her father. he levied another fine, and made a new settlement of the lands, viz. to himself for life, then to his wife for life, remainder to the defendant and his heirs with warranty, &c.

The question was, What estate was vested in *Edward* by the first settlement; that is, whether the "heirs of his body" shall take by purchase or by descent? for if by purchase, then the fine which he levied afterwards, is no bar to them.

IT WAS ARGUED for the plaintiff, that they must take by purchase, because where the ancestor has no estate for life, as in this case he has not, those cannot be words of limitation; that *Edward* had no estate for life precedent to these words; that if he had it must be either, * by express limitation; or, by operation of law. It is not by express limitation, for the estate which is limited to him, is gone by the marriage, and then it is immediately in the wife, and he is not so much as named again but in the limitation where the inheritance, upon failure of having issue male, is fixed in the heirs of his body. Neither can any estate arise to him for life in right of his wife by operation of law, but only *ex post facto*, viz. after the death of his wife. The only authority which looks to the contrary is the case of *Fenwick v. Mitford (a)*, which was a special verdict in ejectment upon a lease made by *Anthony Mitford*, who, being seised in fee, conveyed

If *A.* in consideration of marriage and of 1000l. make a feoffment in fee to the use of himself and his heirs until the marriage takes effect, and afterwards to his intended wife for life; and then to trustees and their heirs, during the life of *ib.* said *A.* to support contingent remainders; and then to his first, second, &c. and so to the tenth son of his body in tail male; then to his heirs male by any other wife, and for want of such issue to the heirs of the body of the said *A.* and for want of such issue to his own right heirs; the heirs of the body of *A.* shall take by purchase and not by descent.

* [381]

S. C. Comb. 312.
S. C. Carth 272.
S. C. Holt, 731.
S. C. 1. Ld. Ray. 33.
1. Vent. 272.
1. Mod. 98.
121. 150. 237.
2. Lev. 75.
2. Salk. 675.
Show. Par. Ca. 104.

Ante, 153. Davis and Speed. 1. Peer Wms. 387. Prec. Chan. 342. 435. 3. Com. Dig. "Descent".
1. Fearn Con. Rem. 53. 2. Bac. Abr. 34. 4. Bac. Abr. 300.

(a) Moor, 284. S. C. 1. Leon, 182. S. C. 2. Co. 91. S. C. 1. And, 284.
See C. p. Lit. 22. b.

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TIPPIN
against
COSON

- 8. Mod. 23.
- 9. Mod. 165.
- 10. Mod. 377.
- 421. 425.
- 2. Vern. 225.
- 486. 729.
- Prec. Chan. 539.
- 442. 461.
- Gilb. E. R. 20.
- 77. 117.
- 1. Peer Wms.
- 59. 229. 397.
- 516.
- * [382]
- 2. Peer Wms.
- 1. 135.
- 3. Peer Wms.
- 63.
- Comy. 72. 123.
- 160.
- Cases T. T. 17.
- 22. 276.
- Sira. 35. 487.
- 2179.

the lands to the use of *Jasper* his eldest son and his wife, and to the heirs males of the body of the said *Jasper*, remainder to his own right heirs ; *Jasper* had issue *Mary* only, and died ; now, though *Anthony* had no particular estate, yet the remainder limited to his right heirs, was in him as his antient reversion, and was never out of him, but it did not vest in his right heirs as a remainder, by way of purchase, because the law created an use in him during his life (though he had departed with the whole fee) till the future use should arise ; and wherever the ancestor takes an estate for life, be it how it will, either by express limitation or operation of law as in that case, and then follows a limitation to his right heirs, they shall not take by purchase, but by descent. But the cases are not parallel, or guided by the same reason ; for the estate moving from *Anthony Mitford*, so much of the use as was not limited was in him as a reversion, which was the very reason of that judgment. But here *Edward* has expressly limited all the estate to trustees during his own life, and the remainder being afterwards limited to the heirs of his body, that must be a new-created estate, and consequently the heirs must take by purchase. It is true, a man cannot make his own right heirs purchasers by the name of "heirs," either in a conveyance by way of use, or by his last will, but he may make them so when an estate tail is given, because that is a new-created estate different from what the law makes. * As if a feoffment in fee be made to the use of the feoffor for life, then to the use of his heirs, and of the heirs males of their bodies, the word "heirs" here is a word of purchase (a) ; for if it should not, then the words which follow, viz. "the heirs males of their bodies," would be void. There is a resolution in the case of *Southcott v. Stowell* (b), which seems to the contrary, viz. *Thomas* had issue two sons, *Sir Popham* his eldest son, and *William* his youngest son ; upon the marriage of his eldest son he covenanted to stand seised to the use of his said son, and of the heirs males of his body, and for want of such issue, to the heirs males of the body of the father, remainder to his own right heirs ; *Sir Popham* had issue *Edward*, and four daughters ; *Thomas* the father died, and *Edward* the grandson died without issue ; it was argued in that case, that if *Thomas* had any estate it must be a fee-simple, upon supposition that the old use remained in him, and that *William*, who was the heir male of the family, should not take by descent, because his father had no estate for life to support the remainder limited to the heirs males of his body, and therefore it ought to go to the daughters who were the heirs general ; but it was adjudged, that *William* their uncle should take by descent, as heir male of the body of *Thomas* who had an estate for life (as they held) by implication, and so the tail was executed in him. The like resolution was in *Michael Mitford's Case* (c) ; he had issue *Robert*, by a first venter ; after-

(a) *Shelley's Case*, 1. Co. 95. b.
(b) 1. Mod. 226. 237.

(c) 1. Mod. 121. 159.

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wards he married a second wife named *Jane*; by her he had issue *Ralph*, who had issue *Robert*; *Michael* upon his second marriage covenants to stand seised to the use of his heirs males to be begotten on the body of *Jane*, reversion to his own right heirs; and it was held that *Michael* had an estate for life by implication (a), and the tail likewise executed in him. But neither of these cases come up to the point now in question, but differ very much; because here the fee-simple was absolutely vested in the trustees during the life of *Edward*; so that he could not have an estate for life either by implication or by operation of law.

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against
COSON.

* A SECOND POINT was made, viz. if it should be adjudged that they take by *purchase*, then whether a *collateral warranty* will not bar the plaintiff, who is an infant; but this was not much insisted on, for it was generally agreed, that the warranty could not have any effect, because it was in the case of an *infant*, and that if she had been of full age, it would not have prevailed, because these *collateral warranties* are not much favoured in law (b).

* [383]

THOSE WHO ARGUED for the defendant made these points: FIRST, If no estate for life were expressly limited to him, yet such an estate he had by way of *resulting use*: and SECONDLY, That the last limitation to him and his heirs will make such an estate. As to this matter it was said, that if *Edward* had an estate for life by way of *resulting use*, then his heirs could not take by *purchase*; and that it was plain he had such an estate, because the reversion of the fee being not disposed by him, it must necessarily follow, that the use of that fee continued still in him, and caused an estate for life till the future use should arise; which estate for life, being always *in esse*, was executed by the statute of 27. Hen. 8. c. 10. to the possession; and though the limitation to his "right heirs" comes after the "heirs of his body," yet that will make no alteration, because not only words but sentences may be transposed to make the deed answer the intent of the party (c). But admitting there could not be any such transposition by the rules of law, then it was said, that the limitation to "the right heirs" of *Edward* was void, because it is no more than what the law would have cast upon them without those words; and that the precedent limitation, viz. to "the heirs of his body," shall not be taken as a new created estate, and different from what he had before in the land, but as the antient use thereof, which was never separated from his person; for the heirs of his body are included in himself, and by consequence such a limitation must carry the use to him; and this is sufficient to create an estate for life in him, as resulting out of the ancient fee; and therefore his heirs must take by descent.

* This was the very reason of the judgment in the case of *Fenwick v. Mitford*, in which there was a solemn resolution made upon con-

* [384]

(a) 2. Mod. 211. 2. Bl. Rep. 687.

(c) See Doe v. Laming, 2. Burr. 1100.

(b) See the 4. & 5. Ann. c. 16.

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against
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ference with ALL THE JUDGES OF ENGLAND, the authority of which judgment has not been yet shaken. No man will deny, that if a particular estate for life had been limited to him by his own act, and afterwards to "the use of his issue in tail, and for "default of such issue to his own right heirs," but that the reversion of that fee expectant upon the determination of the tail had been still in him; for though he had departed with the fee, as *Edward* did to the trustees in this case, yet he did not pass away the reversion of that fee, for that was limited to his right heirs. Now if such a limitation is not void for the reason abovementioned, then it must necessarily create an use in him for life until the future use should happen, because he could have no right heirs during his own life: and my LORD COKE tells us it is the same thing where the estate is created by implication of law or by the act of the party; for which way soever it be, an estate for life he had; and the contingency never happening, he had by that means an estate tail in him which was barred by the second fine. Agreeable to this was the opinion of my LORD HALE in a later case of the same nature (*a*); he held, that by the limitation to "his own right heirs," no new estate was raised, but the reversion of the old estate in fee was qualified in the feoffor or covenantor by operation of law, and made an estate for life in him to serve the limitation; these are his very words.

NOTE.
See Prec. Chan.
342. 438.

There was no judgment given in this case upon the first argument; but THE COURT inclined, that no estate for life did arise to *Edward* to support the subsequent limitations; so that the fee tail was not executed in him, and by consequence the fine no bar (*b*).

(a) 1. Mod. 122.

(b) S. C. Carth. 274. says, The Whole Court upon the first argument was clear in opinion, and S. C. Holt, 731. it was adjudged without difficulty, that this was a contingent remainder, and

such as the heir should take by purchase and not by descent; and accordingly, by S. C. 1. Ld. Ray. 35. JUDGMENT was given for the plaintiff nisi, &c. S. C. Comb. 313. Fearn's Conting. Rem. 52, 67, 68. Prec. Chan. 438.

* [385]

Case 143.

* Walter against Rumball.

Hilary Term, 4. & 5. Will. & Mary. Roll 272.

The Placita.

1. Salk. 147.

3. Ld. Ray. 75.

PLEAS before our lord THE KING and lady the queen at *Westminster*, of the Term of *St. Hilary*, in the fourth and fifth year of the reign of the LORD WILLIAM and LADY MARY now king and queen of *England*, &c.

Memorandum.

SOUTHAMPTONSHIRE, to wit.—Be it remembered that heretofore, TO WIT, on *Saturday* next after eight days of *Saint Martin*, of the Term of *Saint Michael*, in the third year of the reign of the LORD WILLIAM and LADY MARY now king and queen of *England*, &c. before the said lord the king and lady the queen at *Westminster* came *William Walter*, clerk, by *Richard Hill*, his attorney,

Hilary Term, 6. William & Mary, In B. R.

attorney, and brought here into the court of the said lord the king and lady the queen then there, his certain bill against *Edmund Rumball*, in custody of the marshal, &c. of a plea of trespass upon the case; and there are pledges of prosecuting, TO WIT, *John Doe* and *Richard Roe*; which said bill follows in these words, TO WIT, "SOUTHAMPTONSHIRE (to wit) *William Walter*, clerk, complains of *Edmund Rumball*, in the custody of the marshal of the *marshalsea* of the lord the king and lady the queen, being before THE KING and QUEEN themselves, for that (to wit), that whereas the said *William*, on the first day of *November*, in the third year of the reign of the LORD WILLIAM and LADY MARY now king and queen of *England*, &c. at *Andover*, in the county aforesaid, was possessed of the cattle, goods, and chattels following, that is to say, of six swine, twelve pigs, three cows, two bullocks, four horses, one hundred and two sheep, of the price of one hundred pounds of lawful money of *England*, and of two stacks of hay, one stack of barley, one stack of peas, and one stack of wheat, to the value of one hundred pounds of lawful money of *England*, as of his own proper cattle, goods, and chattels; and being so possessed thereof, the said *William*, afterwards, TO WIT, on the tenth day of *November*, in the third year aforesaid at *Andover* aforesaid in the said county, casually lost the cattle, goods, and chattels aforesaid out of his hands and possession; which said cattle, goods, and chattels so lost, afterwards, on the day, year, and at the place last aforesaid, came to the hands and possession of him the said *Edmund* by finding: nevertheless the said * *Edmund*, knowing the cattle, goods, and chattels aforesaid to be the proper cattle, goods, and chattels of him the said *William*, and to him the said *William* of right to belong and appertain, but contriving and fraudulently intending craftily and subtilly to deceive and defraud him the said *William* in this behalf, hath not yet delivered the cattle, goods, and chattels, aforesaid to him the said *William* (although often requested, &c.); but the said *Edmund* afterwards, TO WIT, on the twelfth day of *November*, in the third year aforesaid, at *Andover* aforesaid, converted and disposed of the said cattle, goods, and chattels, to his own proper use and profit: whereupon the said *William* saith that he is injured, and hath damage to the value of two hundred pounds; and thereupon he brings suit," &c.

WALTER
against
RUMBALL.

Declaration in
trover and con-
version, for cat-
tle, goods, and
chattels.

* [386]

AND NOW at this day, TO WIT, *Monday* next after eight days of *Saint Hilary* in this same Term, until which day the said *Edmund* had leave to imparl to the bill aforesaid, and then to answer, &c. before the lord THE KING and lady THE QUEEN at *Westminster* COMETH as well the said *William* by his attorney aforesaid, as the said *Edmund* by *Henry Curle* his attorney; and the said *Edmund* defends the force and injury when, &c. and saith that he is not guilty thereof; and of this he puts himself upon the country; and the said *William* thereupon likewise, &c. THEREFORE let a jury thereof come before the lord THE KING and the lady THE QUEEN

Imparlanee.

"Not guilty"
pleaded.

Hilary Term, 6. William & Mary, In B. R.

WALTER
against
RUMBALL.

QUEEN at *Westminster*, on *Monday* next after eight days of the Purification of the *Blessed Virgin Mary*, and who neither, &c. to take cognizance, &c. because as well, &c. The same day is given to the parties aforesaid there, &c. AFTERWARDS the process between the parties aforesaid is thereupon continued of the plea aforesaid by respiting the jury thereof between them, before the lord THE KING and the lady THE QUEEN at *Westminster*, until *Wednesday* next after fifteen days of *Easter* thence next following, unless the Justices of the lord THE KING and lady THE QUEEN assigned to take the assizes in the county aforesaid, shall before come on *Tuesday* the eleventh day of *April* at the *Castle of Winchester*, in the county aforesaid, by form of the statute, &c. come for want of jurors, &c. AT WHICH DAY before the lord THE KING and lady THE QUEEN at *Westminster*, come the parties aforesaid by their said attornies, and the said Justices of the said lord THE KING and lady THE QUEEN before whom, &c. sent here their record before them had in these words, TO WIT, "Afterwards on "the day and at the place within contained before WILLIAM "DOLBEN, *Knight*, one of the Justices of the lord THE KING "and lady THE QUEEN assigned to hold pleas before THE KING "and QUEEN themselves, and JOHN POWELL, *Knight*, one of the "Justices of the said lord THE KING and lady THE QUEEN of the "bench, Justices of the said lord THE KING and lady THE QUEEN " * assigned to take the assizes in the county of *Southampton* by "form of the statute, &c. COMES the within-named *William* "Walter, clerk, by his attorney within contained, and the within "named *Edmund Rumball*, although solemnly called, did not come, "but made default." THEREFORE the jury whereof mention is within made is taken against him by default; and the jurors of that jury being called, some of them, TO WIT, *John Hale*, *Francis Kent*, &c. (eight more) came and are sworn upon that jury: and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders, by the sheriff of the county aforesaid, being chosen for this purpose at the request of him the said *William Walter*, and by the command of the Justices aforesaid, are newly appointed, whose names are affixed in the panel within written according to the form of the statute in such case lately made and provided: AND THE JURORS so newly appointed, that is to say, *Richard Hawes* and *Joseph Watts*, being called likewise come, who being chosen, tried, and sworn to speak the truth concerning the matters within contained, together with the other jurors aforesaid, before impanelled and sworn to this purpose, say upon their oath, THAT one *John Smith, esq.* on the sixteenth day of *October*, in the twenty-eighth year of the reign of the lord CHARLES THE SECOND late king of *England*, &c. was seised in his demesne as of fee of and in one barn and two hundred acres of land with the appurtenances lying and being in the forest of *Chute*, one part thereof being within the hundred of *Kinnerley*, in the county of *Wilts*, and the other part thereof within the hundred of *Andover Without*, in the county of *Southampton*; and being so seised thereof, afterwards,

* [387]

Tales de circum-
stantibus.

SPECIAL VER-
DICT.

Seisin in fee.

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afterwards, TO WIT, on the seventeenth day of *October* in that same year, by his certain indenture sealed with his seal, and to the jury now shewn here in evidence, bearing date the same sixteenth day of *October*, demised the tenements aforesaid with the appurtenances to one *William Walter*, the father of the said *William Walter*, the now plaintiff, for the term of twenty-one years from thence next following and fully to be complete and ended; yielding and paying therefore during the same term to the said *John Smith*, his heirs and assigns, the yearly rent of forty-three pounds and ten shillings of lawful money of *England*, yearly and every year at the Feast of the Annunciation of the *Blessed Virgin Mary* and *Saint Michael the Archangel* by equal portions; and that by virtue of the said demise the said *William Walter* the father afterwards, TO WIT, the same day and year entered and was possessed thereof for and during the term aforesaid, the reversion thereof to the said *John Smith* then and yet belonging; and that forty-six pounds and eight pence of the rent aforesaid, on the twenty-first day of *October*, in the year of our Lord one thousand six hundred and ninety-one were in arrear and unpaid to the said *John Smith*, for which the said *Edmund Rumball*, on the said twenty-first day of *October*, by the command and order of one *Henry Garmons*, then and continually afterwards until this time being bailiff of the said *John Smith*, he the said *John Smith* being then and continually afterwards until this time in parts beyond the seas, distrained the cattle, goods, and chattels within specified in the declaration within-written, then being the cattle, goods, and chattels of him the said *William Walter* the now plaintiff, being then *levant et couchant* upon the said demised premises, that is to say, one part thereof upon that part of the said demised premises which lies within the said hundred of *Kinnersley*, in the county of *Wilts*, and the other part thereof upon the other part of the said demised premises which lies within the said hundred of *Andover Without*, in the county of *Southampton*, for the rent aforesaid, so being in arrear: and the same day and year gave notice thereof, and of the cause of the said distress to him the said *William*, according to the form of the statute in such case lately made and provided, entitled, "An act for enabling the sale of goods distrained for rent in case the rent be not paid in a reasonable term." AND THE SAID JURORS upon their oath aforesaid further say, that at any time after the distress aforesaid, the said *William Walter*, the now plaintiff, hath not brought or prosecuted any writ to *REPLEVY* the cattle, goods, and chattels aforesaid; wherefore after five days had been elapsed and expired after the said notice to him the said *William*, and before the exhibiting the bill of him the said *William*, TO WIT, on the second day of *November*, in the year of our Lord one thousand six hundred and ninety-one aforesaid, the said *Edmund Rumball*, together with the constable of the hundred of *Kinnersley* aforesaid for the time then being, caused the cattle, goods, and chattels within-mentioned in the declaration aforesaid, within the hundred of *Kinnersley* aforesaid, to be appraised by two appraisers, sworn within that hundred to appraise the same truly according to the

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And demised the premises by indenture.

Lessee entered and was possessed.

* [388]

Rent in arrear.

And the defendant, by order of the landlord's bailiffs (the landlord being beyond the seas) distrained for the rent-arrear upon the lands demised in two hundreds.

The statute of 2. Will. & Mary, c. 5.

No replevin sued out.

The five days expired.

Goods appraised.

And afterwards sold.

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The goods were
not of the value
of the rent.

* [389]

And the residue
unsold yet re-
main in his cus-
tody.

best of their understanding, by the constable of the same hundred of *Kinnersey*, in the presence of the constable of *Andover Without* aforesaid; and that after the said appraisement of the cattle, goods, and chattels aforesaid, and before the exhibiting the bill of him the said *William Walter*, the said *Edmund Rumball* sold a certain parcel of the cattle, goods, and chattels aforesaid to certain persons unknown to the jurors aforesaid. But the said jurors upon their said oath further say, that the said cattle, goods, and chattels so sold, were not of the value of the rent aforesaid, so being * in arrear as aforesaid, nor were sold for the value of that rent so being in arrear: and the jurors aforesaid upon their oath aforesaid further say, that the cattle, goods, and chattels aforesaid were appraised in manner aforesaid, and not otherwise or in any other manner; and that the said *Edmund Rumball* took and carried away the rest of the said cattle, goods, and chattels not sold after the appraisement aforesaid, to be sold when there should be an opportunity, and yet detains in his custody those cattle, goods, and chattels: BUT WHETHER upon the whole matter aforesaid, by the jurors aforesaid in manner and form aforesaid found, the said *Edmund Rumball* be GUILTY of the premises within laid to his charge by the said declaration, the jurors are wholly ignorant, and pray thereupon the advice of the Court of the lord THE KING and lady THE QUEEN now here: AND IF upon the said matter it shall seem to the Court here that the said *Edmund Rumball* be guilty of the premises within laid to his charge by the said declaration; then the said jurors say upon their oath, that the said *Edmund Rumball* is guilty thereof, as the said *William Walter* within thereof complains against him; and then they assess the damages of him the said *William Walter* by occasion thereof, besides his costs and charges by him laid out about his suit in this behalf, to eighty-six pounds, and for those costs and charges to forty shillings: AND IF upon the whole matter aforesaid, by the jurors aforesaid in manner and form aforesaid found, it shall seem to the Court here that the said *Edmund Rumball* is NOT GUILTY of the premises within laid to his charge by the declaration aforesaid, then the said jurors upon their said oath say, that the said *Edmund Rumball* is not guilty of the premises within laid to his charge by the declaration aforesaid, as the said *Edmund Rumball* within in pleading thereupon hath alledged. And because, &c.

* [390]

Case 144.

* *Walter against Rumball.*

If a distress be made of cattle for arrears of rent on land lying within different hundreds, the constable of the hundred where the distress was driven and impounded is the proper officer to swear the appraisers under the statute 2. *Will. & Mary*, c. 5.; and a sale by the distrainer or his bailiff, though neither sheriff, under-sheriff, or constable be present at the sale, for the price at which they were appraised, is good; for it shall be intended the best price unless the contrary appear; and if the goods distrained be not the proper goods of the tenant, the owner cannot bring an action of *trover* to recover them back, if the distrainer gave him notice of the distress five days before the sale, for he might have replevied them; but if the tenant had replevied them, notice to the owner would not have been sufficient.—S. C. 12. Mod. 76. S. C. Salk. 247. S. C. Comb. 336. S. C. 1. Ld. Ray. 53. S. C. Ray. Ent. 103. Ld. Ray. 1424. 1. Burr. 330. 3. Com. Dig. "Distress," (D. 8.). 6. Com. Dig. "Trespas" (C. 2.). 2. Bac. Abr. 114. Bull. N. P. 81.

TROVER. Upon *not guilty* pleaded, a special verdict was found, that *John Smith, esq.* was seised in fee of a barn, and two hundred acres of land in the forest of *Chute*, whereof part was

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in the hundred of *Kinnerley*, in *Wiltshire*, and the other part within the hundred of *Andover*, in *Hampshire*; that, being so seised, on the seventeenth of *October* in the twenty-eighth year of the reign of *King Charles the Second*, he did demise the same to *William Walter* the father of the plaintiff for twenty-one years, under the yearly rent of forty-three pounds ten shillings; that by virtue of that demise the said *Walter* entered; that forty-six pounds and eight-pence was in arrear for rent; that the defendant, by the order of the bailiff or steward of *Mr. Smith* who was beyond sea, distrained the goods in the declaration, for rent, &c. being *levant et couchant* upon the lands demised (a); that part thereof was within the hundred of *Kinnerley*, and the other part within the hundred of *Andover*; that the defendant gave notice of the distress made by him, and that the plaintiff did not replevy the goods; that five days after such notice, the defendant with the constable of the hundred of *Kinnerley*, and in the presence of the constable of the hundred of *Andover*, caused the goods so distrained as aforesaid to be appraised by two persons sworn for that purpose by the constable of the hundred of *Kinnerley*, and in the presence of the constable of the hundred of *Andover*; that after the appraisement the defendant sold some part, but not to the value of the rent in arrear; that he carried away such goods, which remained unsold, in order to sell them when he should have an opportunity; and so made a general conclusion.

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Those who argued for the plaintiff took several exceptions to the verdict.

FIRST, That it was not found that the goods were sold with the concurrence of the sheriff or constable, which they said was contrary to the statute of 2. *Will & Mary*, c. 5.; for by that statute they are required to be present as well at the sale as the appraisement; the reason is, because if there should be any overplus, it must be left in their hands.

* SECONDLY, That it is not found that the goods were sold for the best price which could be gotten for the same, and if sold at an under rate, such sale shall not conclude the party.

* [391]

THIRDLY, That it is not found the defendant had any direction to sell the goods; it is only said that he took them by the authority of the landlord, who must be intended the party distraining, and he might have kept them still as a distress.

But these things were not much insisted on; the material exceptions were,

(a) And now by 11. Geo. 2. c. 19. f. 8. "Every lessee or landlord, his steward, bailiff, receiver, or other person employed by him, may take, as a distress for arrears of rent, any cattle or flock of the tenant, feeding or depasturing upon any common appendant or appurtenant, or any ways belong-

ing to all or any part of the premises demised or holden, AND ALSO all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, growing on any part of the estates demised or holden, &c." And see *Wallace v. King*, 1. H. Bl. Rep. 15.

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FOURTHLY, That it is not found that notice was left at the most notorious place of the premises; but only that it was given to the plaintiff himself, who was owner of the goods, when it should have been given to the tenant of the lands, by the express words of the act.

FIFTHLY, That he has not caused the goods to be appraised pursuant to the statute.

AS TO THE FOURTH POINT, if the statute were out of the case, here is enough found to make the defendant guilty; for, at the common law, no man was to be divested of his property but by the judgment of his peers by the law of the land. It is true, this statute has made some alteration of the common law; but if the authority thereby given be not pursued, or if the party abuse such power which the act invests him withal, he is a trespasser *ab initio*. It is like the case where a defendant as bailiff of a manor, to which waifs and estrays belonged, justified the taking of a gelding as an estray, which he kept till the plaintiff resealed him; and the replication was, that before the re seizure the defendant worked the gelding; and upon a demurrer he had judgment (a); for it is an abuse to work an estray, because the defendant had it only by authority of law, and the abuse thereof makes him a trespasser *ab initio*. But because this case will depend upon the construction of the statute, it is necessary to consider the words, *viz.* It requires that where goods are distrained for rent, "and the tenant or owner of the goods shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent so distrained for, replevy the same with sufficient security to be given to the sheriff according to law, that then, after such distress and notice as aforesaid, * and expiration of the said five days, the person distraining shall and may with the sheriff, or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are required to be aiding and assisting therein), cause the goods to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are impowered to swear) to appraise the same truly according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same, toward satisfaction of the rent and charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use." Now the defendant has not pursued the authority given by this clause either within the words or meaning thereof; and though it be a remedial law, yet considering the hard methods it prescribes, it ought to be taken as a penal law, and so to be con-

11. Mod. 71.
19.
See 11. Geo. 2.
6. 19.

See the case of
Wallace v. King,
1. H. Bl. Rep.
15.

* [392]

found very strongly: that the defendant has not pursued the authority given, appears thus, viz. It is found that the goods belonged to the plaintiff; and that notice was given to him of the distress, when by the express words of the act it ought to have been given to the "tenant of the lands," for otherwise the design of this law is not satisfied, because the tenant of the lands might have paid the rent, and saved the goods; and if not he might have replevied them; and it is not found that he refused to replevy them; so this circumstance is not pursued. That a bare possession without a property will entitle one to a replevin, will not be denied; for it is frequent in our books, that trespass will lie for him in whose possession agistments are, against any one who shall take them away (a). It is true, the act mentions "the owner" who has a special property as well as "the tenant" who has a general property in the goods; but it seems plain, that upon the frame and construction of this clause the person who has the general property ought to have notice of the distress, because, as it has been observed, he might have replevied; and since no man can discharge the duty so well as the tenant, therefore he ought to have the first notice of the distress: he is likewise to be considered in the consequence of this case; for if his cattle be taken away, he cannot cultivate the land.

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against
RUMELL.

10. Mod. 251
12. Mod. 383.

10. Mod. 266.
Ld. Ray. 923.
1091. 1568.
Proc. Chan. 7.

FIFTH POINT. He has not caused the goods to be appraised pursuant to the statute; because a joint authority is given to the person distraining and "to the sheriff, under-sheriff, and constable of the hundred, &c." where the distress is taken, to see the goods appraised: now if * the appraisement was without them, or the appraisers not sworn, or if sworn but not by a proper officer, all is void. And as to that the distress was taken in two hundreds, and the appraisement by persons sworn by one constable and not of that hundred where part of the distress was taken; now the statute requires the constable of the hundred where the goods were taken to see them appraised; so that both the constables of both hundreds had an authority over this distress, because taken in two hundreds, and the constable of one hundred alone had no power over the goods taken out of his hundred. If a man grant the manor of *Dale* in the county of *Wilts*, and it extends as well into *Berks* as the other county, yet no more passes than what is in *Wilts* (b). The statute of *Westminster the Second*, c. 14. gives process in an action of waste against guardians, tenants in dower, &c. and enacts, "That if the defendant do not appear upon the summons, attachment, and distress, the sheriff shall take with him twelve men, and go to the place wasted to enquire of the waste;" this cannot be done by any other person than the sheriff, and it must be done at the very place wasted, and no where else. So the statute of *Merton* (c) enacts, "That where a man is disseised, and re-

* [393]

(a) Year Books 9. Hen. 4. pl. 23.; (b) 2. Roll. Abr. 50.
14. Hen. 4. pl. 28.; 48. Edw. 3. pl. 20. (c) 20. Hen. 3. c. 5.
Bro. Abr. title "Trespass" 63.

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" covers in an assize of *novel disseisin*, and is again disseised by the former disseisor, that there he may have a writ of *redisseisin* directed to the sheriff, commanding him, that *assumptis secum comensatoribus* he shall go to the land in person, &c." The sheriff took with him but one coroner, the other being sick; and upon error to reverse a judgment in *redisseisin*, it was reversed (a) for that very reason, because the authority given by the statute was not strictly pursued; and yet that was a remedial law. The distress in this case is in nature of an execution, and therefore being taken in several hundreds, the constables of both these hundreds should have caused the appraisement to be made.

E contra. The questions arise upon the construction of this statute; the preamble whereof shews, that it was made for the benefit of the landlord, and not of the tenant, and therefore notice to the person of the owner of the goods is sufficient; for what reason can be given why it should be left at the mansion-house, but that the owner might have notice by his tenant to replevy; and it could never be intended that notice should be given to both, because it is in the power of either of them to make a replevin. * [394] It is the owner of the goods that is principally concerned; and therefore a personal notice to him is much better than to be left either at the dwelling-house or any other notorious place upon the lands from which the distress was taken.

As to THE SECOND POINT, the act justifies the sale; for it is not in the nature of a penal law, and so to be strictly pursued, but it is a remedial law, and must be construed according to equity. It proposes a grievance, and then provides a remedy by appraisement and sale of goods, if not replevied within a certain time therein limited. This appraisement was made by the direction of one constable in the presence of the other, and the concurrence of both or either of them seems not to be so necessary in any thing relating to the appraisement as to the giving the oath to the appraisers. The constable is a known officer in the law; all which he is required to do by this act may be done by parol, viz. he may give directions that the appraisement may be duly made; and therefore his presence only is sufficient. His assistance is for the benefit of the landlord, in order to prevent any breach of the peace; and for that reason this law ought to have the most favourable construction that can be made. A small matter will amount to an aiding or assisting in a criminal matter (b), but much smaller in a civil act, especially where it is for the benefit of the party; and here the constables of both hundreds being present, and one administering the oath in the presence of the other, shews this was not only the consent, but the act of both, for they both had authority to do it; and it is sufficient if done by one, because there was no necessity of administering two oaths. Neither is it material that the constable of Andover was out of his hundred, because he having a sufficient authority given him by the statute may exe-

(a) 1. Bullst. 93.

(b) 1. Hale P. C. 436.

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ecute it in any place; and though he should administer an oath out of the hundred, the Court will make a construction of the statute so as to give a remedy to the party, if no inconvenience is likely to ensue.—Then as to the driving of the cattle out of the hundred, it is but one distress, and must be taken as such; and the driving, &c. is but the continuance of the taking (a).

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RUMBALL.

* CURIA. Notice to the owner is sufficient; if not, it is supplied after a verdict by the words *juxta formam statuti notitiam dedit, &c.* It seems to be at the election of him who distrains to give notice either to the tenant or to the owner of the goods (b). Then as to the distress, though it was taken in two hundreds, they being contiguous, it is but one entire distress, especially since it was taken at one and the same time, and for one entire rent, and it ought to be put in one pound; and therefore the officer of the place where the distress was driven is the proper officer within this statute. In trespass for taking of his cattle in D. the defendant justified for damage feasant in his freehold in S. from whence he brought them to the pound in D. and traversed that he took them there; this was adjudged repugnant (c), because the driving them to the pound in D. was only a continuance of the first taking. Latch. 63.

Judgment was given for the defendant.

(a) By 11, Geo. 2. c. 19. s. 19.
"It shall be lawful for any person law-
fully taking any distress for any kind
of rent, to impound, or otherwise to
secure, the distress so made, of what
nature or kind soever it may be, in
such place, or on such part of the
premises chargeable with the rent, as
shall be most fit and convenient for
the impounding and securing such
distress; and to appraise, sell, and
dispose of the same upon the premises,
in like manner, and under the like
directions and restraints, to all intents

and purposes, as any person taking a
distress for rent may do of the pre-
mises by the s. *W. & Mary, c. 5.*"
But it is provided, by sect. 9 "that
notice of the place where the goods
and chattels so distrained shall be
lodged shall, within a week, be given
to the tenant, or left at his last place
of abode."

(b) Bull. N. P. 81.

(c) Sands v. Leigh, cited in the case
of the Bishop of Norwich v. Cornwallis,
Latch. 59, 60. Reported Cro. Eliz.
667.

The King and Queen against Walcott.

Case 145.

A WRIT OF ERROR was brought by John Walcott to reverse an attainder for a treason committed by Thomas Walcott his father. Many errors were assigned, this case depending several Terms in court; but the most material error was in the judgment itself, viz. "*quod interiora sua extra ventrem suum caviantur,*" omitting "*ipsoque vivente comburentur.*"

If the words
"*vivents com-
burentur*" be
omitted in the
record of an
attainder for
high treason,
yet, on error

assigned for this cause, the record cannot be amended, although the words are inserted in the minutes of the clerk of the indictments.—S. C. 2. Salk. 632. S. C. Comb. 369. S. C. Carth. 348. S. C. 12. Mod. 95. S. C. Ho't, 680. S. C. 3. Sr. Tr. 600. S. C. 6. St. 11. Ap. 42. S. C. Show. P. C. 127. Ante, 158. 1. Roll. Abr. 196. Jones, 420. 1. Salk. 47. 371. Show. C. P. 129. 2. Salk. 106. 153. 134. 162. 200. 261. 8. Co. 157. Id. Ray. 565. 1. Com. Dig. 445. 2. Co. 126. 1. Com. Dig. "Amendment" (2. C. 1.).

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These words upon the first argument seemed very essential, and are seldom or never omitted in any of the precedents of judgments for treason. Those who claimed the estate under the king's grant perceiving this to be of some weight, did in another Term move, that MR. TANNER, *Clerk of the Indictments for London*, might attend; which he did, and produced the record of the attainder of Mr. Walcott in court, and also the indictment upon which he was tried; and it appearing that those words were amongst the minutes taken by him, and indorsed on the indictment, IT WAS PRAYED, that the omission might be rectified, and the record amended by the minutes.

• [396] * But this was opposed by the Counsel on the other side, because if these words should be inserted, there would be then two records; and it could not be a question upon which of those words this writ was brought, for certainly it must be upon the record entered at length, and settled by advice of Counsel, and not upon these short minutes taken by the clerk. In the fourteenth year of *Charles the First* (a), A man was attainted of murder before the justices of assize; he brought a writ of error, and assigned for cause, that the record certified by the clerk of the assize was, that he was indicted before the Justices, &c. on the eighteenth of *March*, and tried before the twentieth of the same month, which was an error in fact, because it did not appear that there was any continuance entered between those days; and though it was only a misprision in the clerk in transcribing the record, yet the Court would not suffer it to be amended, it being a criminal case. If there be an error in drawing up the record, this court cannot amend it, but it must be done by that court where the judgment was given (b). It is true, a record of the court of king's bench may be amended by another of the common pleas; but the reason is, because of diminution alledged (c), which cannot be to the sessions of gaol-delivery.

THE RECORD not being amended, it was thus argued for the plaintiff in the writ of error.

The omission of these words was in a necessary and not in a formal part of the judgment. But in criminal cases even matters of form are essential, and so held in this court in the case of *The King v. Tucker* (d); and certainly if the law take care that the indictments should be exact in form, a much greater care ought to be taken in the substantial parts of the judgment. Ever since the reign of *Henry the Seventh*, in almost all the precedents, these words are in the judgment (e). There are some few cases where they are omitted (f), but those were either drawn up in haste, or might be purposely left out, when the king's pardon was intended for the criminal. It is likewise true, that this is a treason at the common-law, and that the statute of 25. *Edw. 3. c. 2.* prescribes no

(a) 1. Roll. Abr. 196.

(b) Phillips v. Bury, 1. Show. 465.

(c) 1. Roll. Abr. 209. 2. Roll. Rep.

471. 8. Co. 162. Foph. 102. Cro. Jac. 628.

(d) 1. Ld. Raym. 1.

(e) Coke's Ent. 361.

(f) 2. Hawk. P. C. ch. 48. l. 3.

form of a judgment in treason ; but yet this judgment shall not be conformable to those at the common law before the reign of *Henry the Seventh*, because all those judgments were defective, and entered only in short notes, which was the true reason of making the statute of 29. *Eliz. c. * 2.* to confirm all attainders of treason made before that time, which (as the statute takes notice) "were" "either defective by corruption, or negligent keeping the records." The like may be said of *THE YEAR BOOK (a)*, which mentions only some short notes of the judgments in treason: it is true, that of *Humphrey Stafford* is at length, but that book and *Brook (b)* in abridging of it are both mistaken; for the roll is, that *ante mortem corda scindantur*. Judgments in treason, which is the highest offence that can be committed, ought to be certain and very exact; they were never yet discretionary, for that would be to give the Judges a power to favour some, and pronounce more severe sentences against others, which they never did, or will undertake to do; they only are to give such judgments which are directed by law. Some variances may be found both in my *Lord Coke (c)* and *STAUNFORD, Justice (d)*, in judgments of treason, but they differ only in immaterial circumstances, such as *drawing on a hurdle, &c.* but agree in all other parts; and where they are entered at length, these words are always inserted. So that these words are necessary or not (e); if not necessary, then those judgments in which they are inserted are all wrongful; but if necessary, then the omission of them is short of what is required by law, and by consequence the judgment is erroneous.

Contra. Those who argued for *THE KING* held, that *drawing, hanging, and quartering*, are the substantial parts of the judgment, and the other words are only in *terrorum*, and may be therefore omitted; that the precedents of judgments in treason are various, *viz.* some things which have been actually done, as drawing on the hurdle, have been omitted in the judgment. In that judgment mentioned by my *Lord Coke (f)*, "*quod secreta membra amputentur*" are left out, and yet those words are necessary in the execution of the judgment itself. They are inserted in the judgment in *Staunford*; but the *Prince of Wales's Case* does not agree either with my *Lord Coke* or *Staunford*; for the judgment there is only "*combustus, &c.*" but does not say "*in conspectu suo*." In all the antient precedents these words are left out (g), and with great reason; for it is inconsistent in nature for a man to be living after his entrails are taken out of his body (h). * In 26. *Car. Rot. 56.* in the notes of the clerk of the peace of *Middlesex*, these words are omitted (i). So they are in *Owen's Case (k)*, where the Court recited the judgment at large. The statute of 25. *Edw. 3. c. 2.*

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* [397]

(a) 1. *Hen. 7. M. 24.*

(b) *Bio. Abt.*

(c) 3. *Inst. 210, 211. Co. Ent.*

361. 423. 699.

(d) *Staunf. P. C. 102.*

(e) *Rastal Ent. 413.*

(f) 3. *Inst. 210.*

(g) *See Fleta, lib. 2. cap. 26.*

(h) 2. *Inst. 195.*

(i) *See 26. Car. 2. Rot. r. and Roll*

343.
(k)

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against
WALSH, &c.

enacts what shall be treason ; yet that is declarative of the common law, and mentions no express form of a judgment for that offence ; so that, notwithstanding that the judgment in treason must be as it stood at the common law (a) : If, however, is no certain judgment for this crime found in any of the ancient law-books ; for they vary from the records, and differ from each other. If the judgment in *Staundford* (b) be law, which agrees with this, saving only in the omission of these words, then my *Lord Coke* (c) is mistaken by leaving out that circumstance of *drawing upon a hurdle*. From this it may be reasonably collected, that he had seen all the records ; and upon consideration of the judgments it was his opinion, that they did and might differ in form according to the circumstances of the case. But if either *THE YEAR BOOK* of 1. Hen. 7. pl. 24. or the abridgment of that case, is law ; then *Staundford* and my *Lord Coke* are both mistaken ; the judgment there is at length ; it is, “ that he be sent back to *THE TOWER*, “ and put upon a hurdle, and drawn through *London* to *Tyburn*, “ and there hanged ; that his heart be cut out before he is dead ; “ his head cut off ; and his body divided into four parts, and left to “ the will of the king.” Now this judgment differs in many things from the judgment in my *Lord Coke* ; for it is not said, *quod suff-* “ *pendatur per collum* ” nor “ *quod vivus ad terram prosteratur*,” nor “ *quod interiora sua extra ventrem capiantur, ipsaque vivente* “ *comburentur*.” It is true, the judgment in the *Earl of Leicester's Case* (d) agrees with that in the *Third Institute* ; but in the fifth year of *Richard the Second*, a man was convicted before *TRAMER*, Chief Justice, for conspiring the death of the king, and the judgment was, “ *quod viscera de corpore suo extrahantur, vivus* “ *comburentur*,” which might be after he was dead. Neither have these words been in all the later precedents ; but if they had, it can be no objection in this case, because this judgment is at the common law, and therefore to argue from modern precedents is not to the purpose. * Besides, the greatest part of these records vary from *Staundford* and my *Lord Coke*, and yet they stand good in law ; and it cannot be shewed where the omission of these words was ever objected, much less where an attainder was ever reversed for this reason. Therefore, if this judgment should be erroneous for the cause now objected against it, many more may be reversed for the omission of more material circumstances.

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CURIA, The attainder ought to be reversed for the omission of these words. As this is the greatest crime, so it deserves the greatest punishment ; and it seems very agreeable to natural justice that there should be some proportion between them. Now though death is *ultimum supplicium*, yet that is the punishment for felony, which is an offence of a less nature ; therefore treason should be punished not only *cum ultimo supplicio, sed cum aggravatione pœne corporalis, vel cum pœna qua nulla asperior* (e), because

(a) 2. Hawk. P. C. ch. 48. s. 3.

(b) Staund. P. C. 102.

(c) 3. Inst. 310.

(d)

(e) Smith's Commonwealth of England, 245.

It is a crime committed against the body politic in the person of the king, who is the head of the kingdom, and of whose preservation the law takes so great care, that it punishes the very intention to commit treason against him (a); but no man can be guilty of a felony without an act done. When the law of England appoints a particular judgment for an offence, it is not in the power of the Judges to alter it, either by any addition or diminution (b). It is true, there is no act of parliament, as has been observed, which appoints a formal judgment in high treason; then it must be considered what judgment was directed by the common law in such cases, and it will appear, that the precedents for above two hundred years have been uniform without the omission of these words, or some of the same import. These were mentioned: In the first year of Henry the Fourth, in the *Earl of Huntingdon's Case* (c), where it is, "that he be cut down alive, and his entrails taken out of his body and burnt." In *Humphrey Stafford's Case*, which is in the Year Book of Henry the Seventh (d), "quod ante mortem cor scindatur;" and *Brook* (e), in abridging of that case, mentions the judgment more fully, viz. he tells us it was "quod ante mortem corda scindantur," which comprehends all the internal parts. The next attainder was of *Edmund Bobun, Duke of Buckingham*, in the thirteenth year of Henry the Eighth; it is mentioned in *Stow's Chronicle* (f), and the judgment is with these words, "In the third year of Edward the Sixth, John Bury was attainted; it is mentioned in my Lord Coke's *Entries* (g), with these words. In the first year of Queen Mary, Robert Dudley was attainted; it is pleaded in the *Earl of Leicester's Case* in the *Commentaries* (h), with these words in that judgment. Then *Justice Staunford*, in his book of the *Plead of the Crown* (i), which he wrote in the second year of Queen Elizabeth, mentions a judgment in high treason with words which amount to the same sense, viz. "that his entrails be burnt in his view." It is so likewise in the case of *John Littleton*, which happened in the forty-third year of Queen Elizabeth; it is pleaded in my Lord Coke's *Entries* (k); and so is the judgment in his *Third Institute* (l). And then in the case of my Lord Stafford, which was in the thirty-third year of Charles the Second, it was debated what judgment should be given against him; and a motion being made that he should have judgment to be beheaded, ten of the Judges were consulted, whether if any other judgment should be given than what was usual in such cases, it would work an attainder of blood; and they were all of opinion that they could not take notice of any judgment in the king's courts but what was appointed by law; and thereupon the lord high steward pronounced the ordinary judgment, viz. that his bowels should be ripped up before his

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12. Hen. 3. 73.

* [400]

(a) Finch. Law, cap. 28.

(b) Foster. 267.

(c) Year Book 1. Hen. 4. pl. 1.

(d) 1. Hen. 7. fo. 20.

(e)

(f) Stowe; page 513.

(g) Co. Ent. 699.

(h) Plowd. 387.

(i) Staund. P. C. 132.

(k) Co. Ent. 422, 423.

(l) 2. Inst. 310.

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face and thrown in the fire (a). As to the objections and precedents produced to maintain a contrary opinion, they may receive this answer : It is objected that this judgment is not erroneous by reason of this omission, because the words "*vivus ad terram proflernatur*" are of the same sense and signification ; but I answer, that those words are in all the precedents cited before, but would not have been sufficient if the subsequent words, "*ipsoque vivente comburentur*," had been left out. The case of *David Prince of Wales* has been objected, which happened in the ninth year of *Edward the First* : It is mentioned by *Fleta* (b), that he "*detrahitus, suspensus, decollatus, dismembratus, et combustus fuit*," but does not say "*in conspectu suo*," to which I answer, This was a judgment in parliament, which differs from the usual judgment not only in this, but in many other things, as may be seen in *Cotton* (c). * There are twenty other judgments in treason before the 25. *Edw.* 3. c. 2. in which these words are omitted ; but it does not appear by THE BOOKS for what species of treason those attainders were. But those judgments were not only defective in this, but in many other parts thereof ; for it is not mentioned in any of them where the quarters shall be disposed, &c. So in those judgments in the reign of *Richard the Second* (d), and in *Easter Term* against *Henry Roper* (e), there was the same defect ; and in the case of *Zouch v. Mannor* (f) it was defective in more particulars, viz. "*quod secreta membra amputentur et in igne ponantur, quod interiora extra ventrem capiantur, et in igne ponantur, et ibidem comburentur*," is all left out. So that these and all other precedents which can or may be produced before the reign of *Henry the Fourth*, signify but little to prove these words may be omitted in treason for conspiring the death of the king, because in those days they were very negligent in entering of judgments ; and therefore, as has been observed, the statute of 29. *Eliz.* c. 2. was made to confirm those irregular and mistaken entries. There may be some judgments of a later date produced wherein these words are left out, it may be in the latter end of the reign of king *Charles the Second*, but they were against *Papish Recusants*, who had neither lands or goods to forfeit, and so little care was likewise taken in entering of those judgments. The giving of judgment against *malefactors* is part of the constitution of the government, therefore it was something extraordinary to affirm at THE BAR, that judgments in high treason were *discretionary*, which indeed is only a softer word for *arbitrary*. If that doctrine should once pass for law, then the Courts which give judgments might make new punishments as they should think more suitable to the crimes ; they might pronounce a *Jewish judgment*, "that the offender should be stoned to death ;" or a *Turkish judgment*, "that he should be strangled ;" or a *Roman*

(a) 3. State Trials, 213, 214.

(b) *Fleta*, lib. 3. cap. 16.

(c) *Cotton's Abr.* 401. 2. Inst. 195.

(d) 21. Rich. 2. Roll 22.

(e)

(f)

judgment,

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judgment, "that he should be murdered;" or a *French judgment*, "that he should be broken on the wheel;" all which are contrary to the known laws of this realm. This being then an essential part of the judgment settled and stated by the common law of *England*, the omission of these words makes it void. Like the common case of a judgment in an *assumpsit* for eight pounds damages and two-pence costs, the entry was thus, *"*ff. IDEO conf. est &c. quod*" (the plaintiff) *recuperet damna sua per jurat. &c. assess. ad octo* "*libras necnon 20s. pro mis. et custagiis de incremento &c.*" omitting the two-pence for costs assessed by the jury, which is not helped or included by the increase, that is, by the act of the court *ex officio*, for which reason the judgment is erroneous (a).—LASTLY, This reason was added to the authorities before recited, *viz.* If this omission in the most severe part of the judgment shall not be error, then those judgments which have these words cannot be supported, because a heavier punishment is by that means afflicted on the subject than is allowed by law, and may for that reason be reversed. Therefore it must of necessity be, that those words make a necessary part of the judgment in high treason, and the omission of them makes it erroneous. Neither is it impossible in nature, as has been objected, that such a judgment should be executed; for Colonel Harrison, one of the regicides, was cut down alive, and after his entrails were taken out of his body he rose up, and had strength enough left to strike the executioner.

The judgment was reversed; which judgment of reversal was afterwards affirmed in the house of lords.

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AND QUEEN
against
WALCOTT.

* [402]

(a) Yelv. 107.

Hunt against Braines.

Case 146.

Hilary Term, 6. Will. & Mary, Roll 411.

REPLEVIN for taking *bona, catalla, et averia, &c.* The defendant made cognizance for the taking of *averia* only, for that a rent-charge of a hundred pounds a-year was granted out of the lands, &c. payable half-yearly at *Michaelmas* and *Lady-day*; that thirty-three pounds parcel of fifty pounds for half-a-year's rent being behind and unpaid, he distrained; and so justifies the taking; *unde petit judicium et return. averiarum bonorum et catallorum prædict.*

Upon a demurrer to this avowry, it was held to be insufficient, because he did not shew when the other seventeen pounds was paid to make up the half-year's rent.

In replevin, a cognisance for only one of the kinds of property charged to be taken; or an avowry for part of half-a-year's rent, without shewing the residue satisfied; is bad.

Besides, the action was brought for taking *bona, catalla, et averia*, and the defendant avowed the taking of *averia* only, which is an answer only for the live cattle, and not for the whole.

And for these reasons the plaintiff had judgment.

S. C. 12. Mod. 84.
Moor, 281.
Cro. Car. 102a.
5. Mod. 77.
1. Saund. 286.
4. Bac. Abr. 394.

8. Mod. 330. 10. Mod. 70. 11. Mod. 203. 219. 12. Mod. 319. 352. Comy. 42. 122. 247. 590. Ld. Ray. 155. 256. 317. 332. 466. 504. 644. 841. 1817. 2100.

EASTER

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

[illegible]

E A S T E R T E R M,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Edward Ward, Knt. Attorney General.

Sir Thomas Trevor, Knt. Solicitor General.

- [403]
Williams, Executor of Mellish, against Cary, Case 147.
Under-sheriff of Wilts.

THE PLAINTIFF, as executor to *Mellish*, brought an action on the case against the defendant for a false return, setting forth, that his testator in the fourth year of *James the Second* had recovered a judgment against one *Smart* for one hundred and forty pounds, and that he sued out a *testatum fieri facias* against him, which he delivered to the defendant, who made execution, and levied goods, &c. to the value of one hundred and one pounds, and returned that he had levied only nineteen pounds nineteen shillings, which he was ready to pay; and that he had more goods in his possession, to the value of forty pounds, which remained with him *pro defectu emptorum*, whereas in truth he had levied more; that afterwards *Mellish* the testator died: and for this false return the plaintiff brought an action, and had a verdict.

If A. obtain a judgment and sue out a fieri facias, and the sheriff falsely return "levied" but that the goods remain for want of buyers, the executor of A. may maintain an action against the sheriff on this false return tho' made in the life-time of the testator.

And now it was moved in arrest of judgment, that the plaintiff, as executor, could not maintain this action, because it was

S. C. 1. Salk. 128.
S. C. 3. Salk.

149. S. C. Comb. 264. 322. S. C. 12. Mod. 71. S. C. Holt, 307. S. C. 1. Ld. Ray. 402.
Moor, 349. 5. Co. 27. Cro. Car. 297. Gilb. E. R. 190. Ld. Ray. 437. 698. 733. 973. 1073.
1. Vent. 30. 1. Sid. 48. 80. Raym. 71. 95. Cro. Eliz. 207. 1. Stra. 60. 212. 576.
Douglt. 159. 6. Com. Dig. "Return" (F. 2.). 1. Bac. Abr. 266. 2. Bac. Abr. 355. 356. 445.
a personal

WILLIAMS
EXECUTOR OF
MELLISH,
against
CARY, UNDER-
SHERIFF OF
WILTS.

a personal tort done to his testator, for which the executor could have no remedy after his death. * In *Hilary Term* in the eighth year of *Charles the First* this was made a doubt in the case of *Purflow v. Prince (a)*, but LORD ROLLE (*b*) in abridging of that case tells us, that the action would not lie (*c*).

12. Mod. 310.
447. 435. 424.
604.
Sira. 212.

E contra. It will not be denied, but that an action of debt will lie against a sheriff for money levied by virtue of an execution, and not answered to the creditor; for though there be no actual contract between the sheriff and the creditor, yet debt will lie upon a contract in law (*d*); because when the money is levied, the action ceases against the defendant, and is transferred to the sheriff; and if it could not be recovered of him, there would be a manifest injury done to the party: It cannot be properly said in this case, that there is any actual wrong or injury done to the person of the testator; for if so, then *moritur cum persona*; but it is an injury done to his personal estate, in which he is represented by his executor, and therefore he may maintain this action within the equity of the statute 4. Edw. 3. c. 13. *de bonis asportatis in vita testatoris*, which gives him an action of trespass for a wrong done to his testator. An executor may have a *replevin* or *detinue* for taking of goods in the life-time of his testator (*e*), because the property still continues, and so does the wrong to his estate in this case. Therefore it has been held, that he may have a *trover* for any conversion in the life of the testator (*f*), and likewise an escape upon mesne process, because the body of the prisoner being a pledge for the debt, the executor might be otherwise without any remedy (*g*). So he may have debt against a parishioner on the statute 1. Edw. 6. c. 13. for not setting out of tithes in the time of his testator, because the statute makes it a duty (*h*). Therefore, though it be true that a personal action dies at common law with the person, yet, upon the equity of this statute, a wrong done to his estate still remains (*i*).

1. Vern. 60.
12. Mod. 565.
2. Peer Wms.
(657.)

Judgment was given for the plaintiff *nisi causa*.

(a) Cio. Car. 297.

(b) 1. Roll. Abr. 913.

(c) ROLLE says, that the plaintiff prayed judgment against himself, in order to commence a new action for his own expedition; for that it had been objected that not returning the writ was a personal tort: but it does not appear that any judgment, or even opinion, was given in the case.

(d) Hob. 206. 1. Ld. Ray. 40.

(e) Noy, 87. Poph. 187. Latch, 167. Jones, 173. 1. Sid. 81. Wentworth's Off. of Ex. 94.

(f) Wentworth's Off. of Ex. 98. Moor, 400. Cro. Eliz. 377. Latch. 168. 1. Lav. 193.

(g) 1. Roll. Abr. 912. Cro. Car. 297. Latch. 168. Ld. Ray. 973.

(h) 1. Sid. 88. 407. 1. Vent. 30. 1. Salk. 314. 1. Com. Dig. 8vo. 344.

(i) See Latch. 168. 1. And. 243. Jones, 174. and the case of Hambly v. Trott, Cowp. 371. *contra*; in which last case the distinction is settled between those actions which do survive and those which do not.

Gibbons against Pepper.

* [405]
Case 148.

ASSAULT AND BATTERY. The defendant pleaded, that he was riding on a horse in the highway, and that on a sudden fright the horse started and run upon the plaintiff, who continued in the way after he was called to go out, which was the same assault. * To this plea the plaintiff demurred.

It was moved in behalf of the defendant, that what he had pleaded was a sufficient excuse; for it was no neglect in him, and the mischief done was inevitable. It is like the case of *Weaver v. Ward (a)*, where in trespass, assault, and battery, the defendant pleaded, that he was a trained soldier, and that he and the plaintiff were under one captain, and in mustering he discharged his gun, which *casualiter, et per infortunium, et contra voluntatem suam*, did hurt the plaintiff; and it was there held, that if the defendant had pleaded that he could not have avoided it, or that the plaintiff had run across the gun when it was discharging, or had set forth the circumstances so that it might appear to the Court to be inevitable, that such a plea had been a sufficient justification.

But it was answered, That case was not parallel with this, because the fact was confessed there; but the battery is not answered here. He should have pleaded the *general issue*, for if the horse run away against his will, he would have been found *not guilty*, because in such case it cannot be said with any colour of reason to be a battery in the rider.

The plaintiff had judgment.

In *assault and battery*, *et plea* that the defendant's horse took fright and run upon the plaintiff, is bad.

S. C. 2. Salk. 637.
S. C. 1. Ld. Ray. 38.
Hob. 138.
Stiles, 72.
1. Vent. 295.
2. Lev. 172.
3. Lev. 37.
2. Jones, 205.
3. Keb. 65.
Lutw. 90.
Ld. Ray. 125.
10. Mod. 304.
12. Mod. 97.
121. 376.
Bull. N. P. 16.
5. Com. Dig. "Pleader"
(3. M. 20.).
Espinas. Dig.
2. edit. 213.
1. Bac. Abr. 53.

(a) Hob. 134. Moor, 864. Roll. Abr. 548.

Derrier against Arnaud.

Case 149.

Hilary Term, 6. Will. & Mary, Roll 416.

INDEBITATUS ASSUMPSIT. The defendant pleaded that the plaintiff was *alienigena in regno Franciæ sub ligeantiâ adversarii (b) domini regis, &c. oriundus*.

Upon a demurrer exception was taken to this plea, because it is not a direct affirmative that the plaintiff was *alienigena*; it should have been *natus*, and not *oriundus*.

CURIA. In a real action the word "*alienigena*" had been well enough.

But some doubt being made whether it was so in this case, a farther day was taken to consider of it; and afterwards, some precedents being cited out of *Rassal (c)*, where the word "*natus*" was supplied by "*oriundus*," the plea was held good.

A plea of *alienigena* is good, although it is not said *natus*, but *oriundus* extra *ligeantiam*.

Ante, 285.
Co. Lit. 129.
Skin. 370.
1. Show. 349.
1. Bac. Abr. 4.
4. B. C. Abr. 97.

(b) Alienage cannot be pleaded in a personal action against an *alien amicus*, Co. Lit. 129. and therefore it must be shewn that the plaintiff is an *alien enemy*, Andr. 96, for this shall not be presumed, Stra.

1082. although the plaintiff may reply that he is under the protection of the king, 1. Salk. 46. Post. 221. Co. Lit. 129.

(c) Rassal. Ent. 252. 605.

St. Leger

A declaration in debt on a wager concerning the mode of playing the game of BACK-GAMMON; to which after praying over of the written agreement, the defendant pleads the Statute 16. Car. 2. c. 7. in bar; and the plaintiff declares, and judgment was given for the plaintiff; but reversed for a variance between the declaration and the written agreement.

DOMINUS REX et DOMINA REGINA mandaverunt dilectis et fideli suo GEORGIO TREBY militi, Capital. Justic. suo de banco, breve suum clausum in hæc verba, viz.

GULIELMUS et MARIA, &c. Respons. GEORGII TREBY militis Capital. Justic. infranominat. recordum et processum loquæ unde infra fit mentio cum omnibus ea tangen. coram domino rege et domina regina ubicunque, &c. addiem infracontent. mitto in quodam recordo huic brevi annex. prout interius mihi præcipitur GEORG. TREBY placita irrotulat. apud Westm. coram GEORGIO TREBY milite et sociis suis justiciariis domini regis et domine reginæ de banco de termino Sancti Michaelis anno regni domini et domine WILLIELMI et MARIE Dei gratia, &c. quinto, rot. 337.

MIDDLESEX ff. JOHANNES ST. LEGER nuper de pàrochia SANCTI MARTINI IN CAMPIS in com. præd. armiger. alias dictus JOHN ST. LEGER of DONOCALC esq. summonitus fuit ad respondend. ROGERO POPE ar. de placito quod reddat ei centum et septem libras et decem solidos quos ei debet et injuste detinet, &c. Et unde idem ROGERUS per JOHANNEM OLIVER attorn. suum dicit quod cum prædict. JOHANNES ST. LEGER et ROGERUS POPE octavo die Julii anno dom. millesimo sexcentesimo nonagesimo primo apud paroch. SANCT. MARTINI IN CAMPIS in comitatu MIDDLESEX latrunculis luser. ad ludum ANGLICE voc. back-gammon cumq. ad ludum illum præd. ROGERUS adtunc et ibidem uno jactu jecit quatuor super unam aleam et quatuor super alteram aleam ANGLICE threw two fours cumque superinde præd. ROGERUS adtunc et ibidem tetigit et paulatim movebat duos latrunculorum suorum ANGL. two of his table-men sed non amovebat illos a statione sua ANGLICE from the point they stood on cumque superinde adtunc et ibidem pignore certat. fuit ANGLICE a wager was laid inter prædict. JOHANNEM ST. LEGER et præfat. ROGERUM modo sequenti videlt. quod præd. ROGERUS solveret præfat. JOHANNI ST. LEGER centum et quinquaginta nummos aureos ANGLICE vocat. guineas si præfat. ROGERUS tenebatur jure lusus illius amovere ANGLICE to play duos latrunculos illos quos ita movit; quodque præd. JOHANNES præd. ROGERUS solveret præfat. ROGERO centum nummos aureos si præd. ROGERUS non tenebatur jure lusus illius amovere ANGLICE to play duos latrunculos illos quos ita movit. Et præd. JOHANNES ST. LEGER et ROGERUS adtunc et ibidem pro determinatione pignorationis illius ANGLICE of that wager posuer. se super judicium atricæsis ANGLICE of the groom-porter of England cumque præd. JOHANNES ST. LEGER eisdem die et anno suprad. apud paroch. præd. per scriptum suum sigillo suo sigillat. curiæque dicti domini regis et domine reginæ nunc hic ostens. cujus dat. est eisdem die et anno cognovit pignoratione præd. ANGLICE the said wager et præd. JOHANNES ST. LEGER per idem scriptum obligavit seipsum solvere præfat. ROGERO POPE vel ordini suo centum nummos aureos ANGL.

ANGLICE vocat. guineas, quando atriensis ANGLICE so soon as the groom-porter adjudicaret. ANGLICE should give his judgment in casu illo si accideret quod iudicium illud foret contra præd. JOHANNEM ST. LEGER. Et idem ROGERUS in fact. dicit quod postea post confessionem scripti præd. et ante impetrationem brevis originalis præd. ROGERI in curia hic, scilicet. 31 die Julii anno domini 1691 supradicto, quidam THOMAS NEALE armiger. tempore confessionis scripti prædicti, et diu antea et abinde adhuc existen. atriensis ANGLICE the groom-porter of England in casu præd. adjudicavit contra præd. JOHANNEM ST. LEGER, scilicet. quod præd. ROGERUS non tenebatur iuratus illius amovere, ANGLICE to play, duos latrunculos illos quos ita movisset nisi movisset illos a statione sua, ANGLICE off from the point; quodq. centum nummi aurei, ANGLICE vocat. guineas, tempore confessionis scripti præd. et diu antea fuer. et adhuc existunt valoris prædictarum centum et septem librarum et decem solidorum; scilicet. apud parochiam præd. in com. præd.; unde præd. JOHANNES ST. LEGER adtunc et ibidem habuit notitiam; præd. tamen JOHANNES ST. LEGER licet sæpius requisit. præd. centum et septem libras et decem solidos eidem ROGERO non reddidit, sed ill. ei hucusque reddere omnino contradixit, et adhuc contradicit; unde dicit quod deterioratus est et damnum habet ad valentiam 40l.; et inde producit sententiam, &c.

ST. LEGER
against
POPE.

Et præd. JOHANNES, per EDMUNDUM HUBBERFEILD attorn. suum, venit et defendit vim et injuriam quando, &c. Et petit auditum scripti præd. et elegitur in hæc verba ss. "I JOHN ST. LEGER of Donocale Esq. do own that I have betted with Lieutenant Colonel Roger Pope one hundred guineas * against an hundred and fifty, concerning a dispute arising on the manner of playing a cast at backgammon, which is stated and signed by us both and Captain Francis Chantrel, and referred to the decision of the groom-porter of England. And I do by these presents oblige myself on the word and honour of a gentleman, to pay unto the said Roger Pope or his order, or whom he appoints to receive it, one hundred guineas so soon as the groom porter gives his judgment on the case, if it so happen that the judgment be against me. The question to the groom-porter is stated under the letters of A. B. and C.; John St. Leger is meant by A. and Roger Pope by B. Given under my hand and seal this 8th day of July 1691."

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Quibus lectis et auditis idem JOHANNES dicit quod ipse de debito præd. virtute scripti præd. onerari non debet; quia dicit quod in statuto in parlamenti DOMINI CAROLI SECUNDI nuper regis Angliæ inchoat. apud et estm. in com. MIDDLESEX octavo die Maii anno regni d. et. domini nuper regis decimo tertio et per diversas prorogationes et adjournment. ibid. continuat. usque decimum sextum diem Martii anno regni ejusdem nuper regis decimo sexto inter alia autoritate ejusdem parlamenti ordinat. et inestitat. fuit quod si aliqua persona vel persona ad aliquod tempus vel tempora post viccesimum nonum diem Septembris in anno domini 1664 luderet ad et cum piæis chartis, ANGLICE cards, aleis latrunculis, &c. (reciting the statute) prout.

St. Leger
against
Pope.

*per eundem actum inter alia plenius apparet. Et idem JOHANNES in facto dicit quod post 29 diem Septembris anno domini 1664 supra- dicti. et ante confecti. onem scripti præd. scilicet. præd. octavo die Julii anno domini 1691 suprad. apud p. roch. præd. in com. præd. ipse idem JOHANNES et præd. ROGERUS ludebant cum aleis ad quendam ludum vocat. backgammon, quodque præd. centum nummi aurei vocat. guineas in præd. script. mentionat. adtunc et ibidem, ad unum tempus et unum congressum, ANGLICE meeting, fuerunt pignorati. ANGLICE betted, per eundem JOHANNEM cum præd. ROGERO et perdit. in lusu illo et non cum vel pro pecuniis deposit. ANGLICE ready money; quodque præd. centum nummi aurei, vocat. guineas, tempore pignorationis illius, ANGLICE at the time of the said bett, necnon tempore adjudicationis in narratione præd. ROGERI per THOMAM NEALE in eadem narratione mentionat. fieri supposit. fuerunt valoris * ultra summam centum librarum viz. valoris centum et septem librarum et decem solidorum superius petit. viz. apud parochiam præd. in com. prædicti. quodque præd. centum nummi aurei tempore lusus illius non fuerunt pignorati. ANGLICE betted, in pecuniis deposit. ANGLICE ready money, neque tempore adjudication. præd. in narratione præd. fieri supposit. so ut. sed pro securitate solutionis præd. centum nummorum aureorum per ipsum JOHANNEM cum præd. ROGERO ut præfertur pignorati. ANGLICE betted, idem JOHANNES postea scilicet. prædicto octavo die Julii anno dom. millesimo sexcentesimo nonagesimo primo supradicto apud paroch. præd. in com. præd. scriptum præd. in narratione præd. mentionat. præfat. ROGERO dedit sigillavit et ut factum suum deliberavit, per quod ac vigore statuti præd. in eo casu inde edit et provis. scriptum præd. fuit et est vicium et nullius vigoris in lege; et hoc paratus est verificare; unde petit judicium si ipse de debito prædicto virtute scripti præd. querari debeat, &c.*

* [409]

To this plea the plaintiff demurred, and the defendant joined in demurrer.

JUDGMENT was given for the plaintiff in the common pleas; and now a writ of error was brought, and the general error assigned, and *in nullo est erratum* was pleaded.

Cafe 151.

St. Leger against Pope.

Quere, If a declaration in debt for "one hundred pieces of gold coin" CALL Dgvi-neas, of the value of one hundred and five pounds, be good.

THE PLAINTIFF AND DEFENDANT were playing at *backgammon*, and the plaintiff in the action touched the *tablemen*, but did not remove them from the *points*. A dispute arising between them ended in a wager, which was reduced into writing, by which the plaintiff in error was obliged to pay *Mr. Pope* an hundred guineas if he was not bound by the course of play to remove and play those *tablemen* he touched, and *Mr. Pope* was to pay him one hundred and fifty guineas if he was obliged. This wager was to be decided by the *groom porter*, who gave judgment, that *Mr. Pope* was not obliged to play the men he touched; whereupon the hundred * guineas were lost; for which the action was brought below; and upon the statute pleaded, judgment was given for the plaintiff.

S. C. 1. Lutw. 484.

S. C. N. Lutw. 147.

S. C. 5 Mod. 4.

S. C. Salk. 344.

S. C. Comb. 327. S. C. Skin. 572. S. C. Carth. 322. S. C. 12. Mod. 81. S. C. Holt, 553. 10. Mod. 336. 2. H. Bl. Rep. 45.

IT WAS NOW ARGUED for the plaintiff in error, that the demand was wrong, because the note on which the action is brought is for payment of *guineas*; now *guineas*, *quatenus* such, cannot be demanded, because they are of no certain or determinate value, for they may be altered, added to, or diminished, by prerogative; and therefore the statute 5. & 6. *Edw. 6.* prohibits the buying of coin, because no person can set a value thereon but the king (a). Besides, *guineas* are by proclamation at *twenty shillings* value (b), and no more; and if so, the plaintiff has a judgment for more than the law allows; and this being an *English coin*, you cannot declare for it *ad valentiam*, &c. as it is usual for *foreign coin*; in which case the action is brought in the *detinet* only, because the value of such coin is not known to the Court, and therefore it is uncertain what sum shall be recovered. But for *English coin* the action is always brought in the *debet* and *detinet*, and without *ad valentiam*. If, therefore, the legal value of a *guinea* be *twenty shillings*, the plaintiff has obtained an unlawful judgment, *viz.* for more than the value; if it be above *twenty shillings*, then the sum will amount to more than one hundred pounds, and so within the statute of gaming.

ST. LEGER
against
Pozz.

TO THIS it was answered, that the writing does warrant the declaration and the demand; for if *guineas* be not of the noted and common coin of the kingdom, and of no certain value, then they are as *foreign coin* to the Court, and they may be demanded as in that case, so likewise in this, by so many "pieces of money *valoris*, &c." and in the *debet* and *detinet*, because the value of them is reduced to a certainty. But if the demand here had been of *guineas* only, without saying so many "pieces of gold," then it had been like the demand of *dollars* in *foreign coin*, and the action must have been brought in the *detinet*, because the thing in specie is demanded.

THEN as to the *statute of Gaming* (c), it does not concern this action, because this is a wager, and not within the reach of that law; it is not any playing, but a collateral matter concerning the right of a particular game.

A wager on the mode of playing backgammon is legal.

No judgment was given concerning this matter (d):

* [411]

BUT AN OBJECTION was made, that there was a *variance* between the declaration and the note therein set forth; for the action was grounded on a wager; and the plaintiff declared, * that the defendant *per scriptum suum*, &c. *cognovit pignorationem*, *ANGLICE* the *wager*, and upon oyer of the writing there is nothing therein relating to such an acknowledgement; so that he made that to be a part of the description of the writing which should have come in by way of averment out of it, *viz.* he ought to have averred that the

A variance between the declaration and the agreement with which the action was brought.

(a) 1. Hale, 197. 1. Hawk. P. C.

(c) The 16. Car. 2. c. 7.

ch. 18.

(d) See 1. C. 5. Mod. 4; and 11.

(b) See the statute 8. Will. 3. c. 8.

Case of Brown v. Lecleson, 2. H. El.

6. Geo. 1. c. 11. o. Geo. 3. c. 37.

Rep. 481

14. Geo. 3. c. 42. 18. Geo. 3. c. 44.

Easter Term, 7. Will. 3. In B. R.

ST. Leger *against* **POPE.** wager in the writing, and for which the action was brought, was the same wager, &c.

And for this reason the judgment was reversed.

Cafe 152.

Strode *against* Birt.

Trinity Term, 6. Will. & Mary, Roll 515.

Record of a declaration, with demurrer and judgment thereon, in an action on the case for disturbance of common.

DOMINUS rex et domina regina mandaverunt dilecto et fidei suo GEORGIO TREBY Miles Capitalis Justiciarius de banco breve suum clausum in hæc verba viz. GULIELMUS et MARIA Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex et regina fidei defensores &c. dilecto et fidei suo GEORGIO TREBY Militi. Capitali. Justiciario suo de banco salutem. Quia in recordo et processu, ac etiam in redditione judicii, loquelæ que fuit in curia nostra, coram vobis et sociis vestris, Justiciariis nostris de banco, per breve nostrum, inter THOMAM BYRT et EDWARDUM STRODE armigerum et RICHARDUM THORN, de quadam transgressionem super casum, eidem THOMÆ, per præf. EDWARDUM et RICHARDUM illat. ut dicitur error intervenit manifestus ad grave damnum ipsorum EDWARDI et RICHARDI sicut ex querela sua accepimus; nos errorem si quis fuerit modo debet. corrigi, et partibus præd. plenam et celerem justitiam fieri volentes in hac partes, vobis mandamus quod si judic. inde reddit. sit tunc recordum et processum præd. cum omnibus ea tangen. nobis sub sigillo vestro distincte et aperte mittatis et hoc breve, ita quod ea habeamus in octub. Purificationis Beate Mariæ ubicunque tunc fuerint in Anglia, ut inspect. record. et processu præd. ulterius inde pro errore ill. corrigend. fieri faciamus quod de jure et secundum legem et consuetudinem hujus regni Angliæ fuerit faciend. Teste nobis ipsis apud Westm. vicesimo nono die Januarii an. reg. nostri quinto.

PAGET.

Responf. GEORGII TREBY Mil. Capitali. Justiciar. infranominat. record. et process. loquelæ unde infra fit mentio cum omnibus ea tangen. coram * domino rege et domina regina ubicunque &c. ad diem infracontent. mitto in quadam recordo huic brevi annex. prout interius mihi præcipitur.

GEO. TREBY.

Placita irrotulat. apud Westm. coram GEORGIO TREBY Militi. et sociis suis Justiciariis domini regis et domine regine de banco de termino Sancte Trinitatis anno regni DOMINI GULIELMI et DOMINE MARIE Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ regis et regine fidei defensor. &c. quinto Rot. 313.

SOMERSET ff. EDWARDUS STRODE nuper de Downside in com. præd. armiger et RICHARDUS THORNE nuper de eadem yeoman attor. fuerunt ad respondend. THOMÆ BYRT de placito transgr. super casum &c. Et unde idem THOMAS per GALFRIDUM POTTINGER attorn. suum queritur quare cum ipse idem THOMAS BYRT primo die Martii anno regni domini regis et domine regine. nunc secundo, et continue abinde postea hucusque legitim. possid. fuit, et: aabus:

ad hoc possessoriat. existit de et in uno tenemento continen. in se unum molendinum fullonicum, unum molendinum granaticum, unum clausum pasturæ, unam rodam terræ, et unam pecium terræ, vocat. WYTHYBED, cum pertin. in paroch. de SHEPTON MALLET in com. præd. ac per totum idem tempus ipse idem THOMAS BYRT de jure habuisset et habere et gaudere debuisset communiam pasturæ in mille acris terræ vocat. MENDIP FOREST in com. præd. pro omnibus averiis suis communicabilibus in et super tenementa prædicta cum pertin. levan. et cuban. quolibet anno omni tempore anni tanquam ad tenementa sua prædicta spectant. et pertinent. prædicti. EDWARDUS et RICHARDUS præmissorum non ignari sed machinantes et malitiose intendentes eundem THOMAM BYRT in hac parte minus rite prægravare injurare et quamplurimum damnificare et ipsum THOMAM BYRT de communia sua prædicta in præd. mille acris terræ vocat. MENDIP FOREST et de usu proficuo et beneficio inde magnopere et minus juste impedire et depravare ac ipsum THOMAM pejorare et deteriorare, ipsi iidem EDWARDUS et RICHARDUS eodem primo die Maii anno secundo supradicto apud SHEPTON MALLET præd. solum et fundum præd. mille acrarum terræ vocat. MENDIP FOREST in diversis locis ejusdem foreste offoderunt et subverterunt et quamplurima antra per cuniculis ANGLICE cony-boroughs, adtunc et ibidem fecerunt et erexerunt et cuniculos adtunc et ibidem in eisdem mille acris terræ vocat. MENDIP FOREST locaverunt et propagaverunt et antra et cuniculos ill. ibidem per totum tempus ill. custodiverunt et continuaverunt; qui quidem cuniculi quamplurimam part. herbæ ibid. crescent. diversis diebus et vicibus infra tempus præd. depast. fuerunt spoliaverunt conculcaverunt et consumpserunt. Iidemq. EDWARDUS et RICHARDUS eodem primo die Maii anno secundo supradicto, et diversis diebus et vicibus, infra tempus præd. in eisdem mille acris terræ vocat. MENDIP FOREST quamplurimos laqueos et tendiculos ibidem sparsim fixerunt, posuerunt, custodiver. et fingi, et poni procuraverunt; per quod viginti oves ipsius THOMÆ BYRT in et super tenementa sua prædicta cum pertin. levan. et cuban. per ipsum ad herbam in eisdem mille acris terræ vocat. MENDIP FOREST tunc crescent. depascen. imposuit uten. communia sua præd. in laqueos et tendiculos ill. ibidem incidit. et ibidem capt. quamplurimum damnificat. deteriorat. et spoliat. fuerunt et nullius usus sive valoris eidem THOMÆ, adtunc et ibidem, devenerunt; ratione quorum quidem præmissorum idem THOMAS communiam suam præd. pro ovibus et averiis suis præd. in et super tenementa sua præd. cum pertin. levan. et cuban. per totum tempus præd. habere uti seu gaudere in tam amplo et beneficii modo prout debuit uti seu gaudere non potuit, sed idem THOMAS usum proficuum commoditatis ejusmodi et beneficium communie pasturæ suæ præd. in præd. mille acris terræ vocat. MENDIP FOREST, per totum idem tempus perdidit et amisit ad dampnum ipsius THOMÆ centum librarum; et inde producit sectam, &c.

[413]

Et prædicti. EDWARDUS et RICHARDUS, per HENRICUM GODFREY attorn. suum, ven. et defend. vim et injuriam quanto &c. Et dicunt quod narratio præd. materiâ in eadem content. minus sufficient. in lege existunt ad ipsum THOMAM attornem suam præd. inde versus eosdem EDWARDUM et RICHARDUM habend. seu manutenend. ad quam quidem narrationem iidem EDWARDUS et RICHARDUS necesse

STRODE
against
BART.

[414]

non habent nec per legem terræ tenetur respondere : et hoc parat. sunt
verificare : unde pro defectu sufficien. narration. in hac parte, iidem
EDWARDUS et RICHARDUS petunt iudicium et quod præd. THOMAS
ab actione sua præd. inde versus ipsos habend. præcludatur &c.
Et pro causis moration. in lege iidem EDWARDUS et RICHARDUS
dicunt, et ostendunt Curie hic, quod præd. THOMAS in narratione
sua præd. non monstrat aliquam præscription, seu aliquem alium titu-
lum ad communionem præd. habend, ac etiam dicta * narratio valde
incerta est et caret forma.

Et præd. THOMAS ex quo ipse sufficien. materiam in lege in nar-
ratione sua præ. ad action. suam præd. versus præd. EDWARDUM
et RICHARDUM habend. manutenend. superius declaravit quam ipse
ferat. est verificare; quam quidem materiam præd. EDWARDUS et
RICHARDUS non dedicerunt, nec ad eam aliquositer respondent, sed
verificationem ill. admittere omnino recusant iidem THOMAS petit iudi-
cium et damna sua occasione præmissor. sibi adjuvaciari &c. Et quia
iustici. hic se adu'sare volunt de et super præmissis priusquam iudicium
inde reddant dies inde datus est partibus præd. hic usque a die Sancti
Michaelis in tres septimanas de audiend. inde iudicio suo eo quod iidem
iustici. hic inde nondum &c. Ad quem diem hic venit tam præd. THOMAS
quam præd. EDWARDUS et RICHARDUS per attorn. suos præd.
et super hoc visis præmissis et per iusticiar. hic plenius intellectis
videtur eisdem iusticiar. quod narratio præd. in forma præd. fact.
et declarat. ac materia in eadem content. sufficien. in lege existunt
ad ipsum THOMAS actionem suam præd. versus præfat.
EDWARDUM et RICHARDUM habend. manutenend. prout præd.
THOMAS superius allegavit ac quod iidem THOMAS damna sua oc-
casione præmissorum versus præfat. EDWARDUM et RICHARDUM
recuperare debeat. Sed quia nescitur quæ damna idem THOMAS ius-
tinuit occasione præmissorum præcept. est vic. quod per sacramentorum
procurum et legalium hominum de baliva sua diligenter inquirat quæ
damna idem THOMAS iustinuit tam occasione præmissorum quam pro
missis et custagiis suis per ipsum circa scitiam suam in hac part. opposit.
et inquisitionem quam, &c. Vic. constare fac. hic. In octab. Sancti
Hilarii sub sigillo, &c. et si illis, &c.

[415]

Ad quem diem hic venit præd. THOMAS per attorn. suum præd. et
vic. videlicet ROBERTUS SIDERFIN armiger nudo mand. hic quandam
inquisitionem coram eo apud civitat. WELLEN. in comitatu præd. 12
die Januarii ult. præterit. per sacramentum duodecim, &c. capt. per
quam compertum existit quod præd. THOMAS iustinuit damna occasione
præmissorum utrumque miss. et custag. sua per ipsum circa scitiam suam in
hac parte opposit. ad quinque solid. et pro miss. et custagiis ill. ad duos
denarios; in eo consistit quod præd. THOMAS recuperet versus præfat.
EDWARDUM et RICHARDUM damna sua præd. ad quinque jointas et
duos denar. per inquisitionem præd. in forma præd. compert. utrumque
quindecim libras quatuordecim solidos et decem denar. eidem THOMAS
ad requisition. suam per miss. et custagiis suis per curiam hic de incre-
mento ad iudicet. quæ quidem dampna in toto se attingunt ad 16 l. et
per præd. EDWARDUM et RICHARDUM in misericordia, &c. Sign. 28 die
Februarii anno festo WILLIELMI et MARIE.

Postea

Pfista, scilicet die Veneris prox. post crastinum Sanctæ Trinitatis anno regni DOMINI WILLIELMI et DOMINÆ MARIE nunc regis et reginæ Angliæ, &c. sexto coram domino rege et domina regina apud W.stm. venerunt prædicti. EDWARDUS STRODE et RICHARDUS THORNE per PETRUM COURTNEY attorn. suum et dicunt quod in recordo et processu prædicti. ac etiam in redditi n. iudicii prædicti. manifeste est erratum in hoc videlicet. quod per recordum prædicti. apparet quod iudicium ill. in forma prædicti. reddidit. reddidit. fuit per prædicti.

*THOMA BYRT versus prædicti. EDWARDUM STRODE et RICHARDUM THORNE ubi per legem tenet hæc regni nostri Angliæ iudicium illud reddidit debuisse pro prædicti. EDWARDO STRODE et RICHARDO THORNE versus eundem THOMAM BYRT ideo in eo manifeste est erratum. Erratum est etiam in hoc quod non habetur aliquod breve original. inter prædicti. partes de placito prædicti. ad warrantizandum narrationem prædicti. THOMÆ BYRT prædicti. de recordo affiat. nec de recordo roman. in custodia custodit brevium dicti. domini regis et dominæ reginæ de banco prædicti. ideo in eo similiter est erratum. Et iidem EDWARDUS STRODE et RICHARDUS THORNE petunt breve dicti. domini regis et dominæ reginæ in præsent. custod. brevium ipsorum domini regis et dominæ reginæ de banco prædicti. dirigend. ad certificand. dicti. domino regi et dominæ reginæ plenius inde veritate et eis conceditur &c. per quod præcept. est WILLIELMO THURSBY armigero custod. brevium dicti. domini regis et dominæ reginæ de banco prædicti. quod scrutatis brevibus originalibus de com. Somerset de termino Sanctæ Trinitatis anno regni dicti. domini regis et dominæ reginæ nunc quinto in custodia sua de recordo existet. et quid de eodem brevi invenerit una cum rector. ejusdem a deo plane et integre prout coram se remanet dicti. domina regi et dominæ reginæ indilate ubique; &c. certifi. et una cum brevi dom. regis et dominæ reginæ sibi inde directi: &c. Qui quidem WILLIELMUS THURBY custos brev. de banco prædicti. dicti. domino regi et dominæ reginæ retorndavit et certificavit quod virtute brevis prædicti. sibi directi. scrutat. brevibus originalibus comitatus Somerset. * prædicti. de prædicti. termino Sanctæ Trinitatis anno quint. jurradicti in custodia sua existet. in eisdem invenit quoddam breve original. inter partes prædicti. de placito prædicti. de recordo affiat. cujus quidem brevis tenor sequitur in hæc verba ff. GULIELMUS et MARIA Dei gratia Angliæ Scot. Franciæ et Hiberniæ rex et regina fidei defensores, &c. vicecomiti SOMERSET. salutem. Si THOMAS BYRT jecerit te, etiam de elmore suo prosequend. tunc pone per vaais et suu. pleg. EDWARDUM STRODE nuper de Dunsford in com. tuo ar. et RICHARDUM THORNE nuper de Dunsford, in com. tuo yeom. n. quod sint coram Justiciariis nostris apud W.stm. in crastino Sanctæ Trinitatis ostens. quare cum ipse idem THOMAS BYRT primo die Maii anno regni nostri secundo et continue abinde psten hucusque legitime possidit. fuit (as in the declaration) ad dominum ipsius THOMÆ et tum librarum ut dicit, &c. et habet nomina pleg. et hoc breve. Tste nobis apud W.stm. 26 die Maii anno regni nostri quint. PAGET. Per dominum custodem magni sigilli Angl. ad instantiam pten. pleg. de prof. JOHANNIS DOE et RICHARD. ROE infra omnat. EDW. et RICHARD. nichil habent in balliva mea per quod attach. possunt. WARWICK BAMPFIELD.*

STRODE
against
BYRT.

ar. Vic. ret. per fin. H. HETHERINGTON. Quod quidem breve de certiorari una cum ret. n. inde inter recorda sine die istius termini afflat. et super hoc idem THOMAS BYRT per JOSEPHUM SHERWOOD attorn. suum gratis ven. Super quo præd. EDWARDUS STRODE et RICHARDUS THORNE ut prius dicunt quid in recordo et processu præd. ac etiam in redditione judicii præd. manifesti. est erratum allegand. errores præd. per ipsos in forma præd. allegat. et pet. quod iudicium præd. ob errores ill. et al. in recordo et processu præd. existens. revocetur, adnulletur et penitus pro nullo habeatur, et quod ipsi ad omnia quæ occasione judicii præd. amiserunt restituantur, et quod præd. THOMAS BYRT ad errores præd. rejangat. et quod curia dicti domini regis et domine regine nunc hic procedat ad examinationem tam record. et process. præd. quam mater. prædict. superius pro errore assign. Super quo præd. THOMAS BYRT dicit quod nec in recordo et processu præd. nec in redditione judicii præd. in ullo est erratum; et petit similiter quod curia dicti domini regis et domine regine nunc hic procedat ad examinationem tam record. et process. præd. quam mater. prædict. superius pro erroribus assign. et quod iudicium præd. in omnibus affirmetur, &c. Et quia curia dicti domini regis et domine regine nunc hic de iudicio suo de et super præmissis reddend. nondum advisatur dies inde dat. est scilicet tibus coram dict. domino rege et domina regina a die Sancti Michaelis. in tres septimanas ubi cunq. &c. de iudicio suo inde audiend. eò quod curia dict. domini regis et domine regine nunc hic inde nondum, &c. Ad quem diem coram domino rege et domina regina apud Westm. ven. partes præd. per attorn. suos præd. sed quia cur. dict. dom. regis et domine regine nunc hic de iudicio suo de et super præmiss. præd. reddend. nondum advisatur dies inde datus est partibus prædict. coram domino rege et domina regina usque in festab. Sancti Hilarii ulicunque &c. de iudicio suo inde audiend. eò quod cur. dict. domini regis nunc hic inde nondum, &c. Ante quem diem DOMINA MARIA regina diem suum clausit extremum. Ad quem diem coram DOMINO WILL. tertio nunc rege Angliæ, &c. apud Westm. ven. partes præd. per attorn. suos præd. et sic continuatur usque in crastino Sancti Trinitatis ubi cunq. &c.

The continu-
ances begin in
Mich. anno 6.
Will. & Mariæ,
and end in Tri-
nity Term, anno
8. Will. 3.

Ad quem diem coram dom. rege apud Westm. ven. partes præd. per attorn. suos præd. super quo visis et per cur. dict. domini regis nunc hic plenius intellectis omnibus et singulis præmissis diligenterq. examinatis et inspectis tam record. et process. præd. quam præd. causis et materiis superius pro error. assign. videtur cur. dicti dom. regis nunc hic quod nec in record. et process. præd. nec in redditione judicii præd. in ullo est erratum, ac quod record. ill. in nullo vitiosum aut defectivum existit; ideo conf. est quod iudicium præd. in omnibus affirmetur ac in omni sub robere stet et effectu dictis causis et materiis superius pro error. assign. in aliquo non obstan. Et ulterius per cur. dom. regis nunc hic conf. est quod præd. THOMAS recuperet versus præd. EDWARDUM et RICHARDUM triginta et unam libras eidem THOMÆ per cur. dom. regis nunc hic secundum formam statuti in huiusmodi casu nuper edit. et provis. ejusdem cat. pro custagiis et damnis suis quæ justinuit occasione dilacion. ex utroq. iudicio præd. prætextu prosecution. prædict. brevis de error. et quod præd. THOMAS habeat inde execution. suam, &c.

Strode

* Strode against Byrt.

Case 153.

THE PLAINTIFF brought an action on the case against the defendant, setting forth, that he was *possessed* of a tenement, and of a close of pasture, and rood of land, &c. in *Shepton Mallet*, and that he had right of common in *Mendip Forest* for his cattle, &c. *tanquam* thereunto belonging; that the defendant did dig and make coney-boroughs in the said forest, and set nets and gins there, by which his sheep were dammified, and he deprived of his right of common, &c. The defendants demur to the declaration; and judgment was given against them in the common pleas; and upon a writ of error brought in this court,

In an action for disturbance of common, it is not necessary for the plaintiff to shew title to the common; it is sufficient to state that he was *possessed* of a tenement, &c. and had right of common in the place where, &c.

The question was, Whether the declaration was good or not?

FIRST, Because it sets forth that the plaintiff *legitime possession*. *suit de tenemento*, &c. which was not sufficient to entitle him to this action, but that he ought to shew a title by *custom* or *prescription*, or otherwise, and not to declare upon the bare *possession*, without any other right; for he, claiming a profit arising out of another man's soil, ought to have set forth a particular estate to himself, either by grant, prescription, or some conveyance, and not to say that he was possessed, &c. and ought to have common, &c. *tanquam ad tenementa sua spectan*. without shewing how, or in what manner, which is so uncertain, that no issue can be taken upon it. Therefore he ought to have shewn the commencement of his estate, and how he came to be intitled to the common, which in this case must be either appendant, or nothing; and if so, he must set forth the beginning of it, that the defendant may give him an answer.

S. C. 12. Mod. 97.
S. C. Skin. 621.
S. C. 3. Salk. 12.
S. C. Comb. 370.
S. C. Comy. Rep. 7.
Ante, 175.
Co. Lit. 303.
Cro. Eliz. 419.
1. Vent. 264.
319. 356.
Cro. Jac. 43.
Cro. Car. 500.
3. Lev. 175.
266.
Lut. 120.
2. Lev. 148.
3. Mod. 49.
10. Mod. 228.
300. 158.
11. Mod. 179.
220.

SECONDLY, It is impossible that the defendant can take issue upon this declaration; for it is said, that the plaintiff *de jure debuisse habere communiam*; now if the defendant had pleaded *non de jure habere debuisse*, then the law, and not the fact, had been put in issue. * It is true, when an action is brought upon a *possession* for a wrong done, then such a general way of declaring may be well enough; but where *the right* is in question, it is never so. Now this action is brought upon the right, &c. for the words *de jure debuisse habere*, &c. and *gaudere debuisse* import a right and nothing else (a). In trespass for the taking of a gelding and impounding of it, the defendant pleaded, that *tempore quo*, &c. he was *possessed*, &c. of a close, &c. in which he took the gelding *damage feasant*; and upon a demurrer it was shewn for cause, that he had not set forth by what title or in what manner he was possessed; and judgment was given for the defendant (b). So in trespass for chasing of his sheep, the defendant made countenance as bailiff to Serjeant Trindar for *damage feasant* in an acre of ground, of which the serjeant was possessed; and there was a demurrer to

* [419]
1. Ld. Ray. 266.
2. Ld. Ray. 923.
1134.
Stra. 1238.
4. Bac. Abr. 15.
5. Com. Dig. "Pleader" (C. 39.)
1. Burr. 440.
Bull. N. P. 76.
3. Term Rep. 767.

(a) Ante, 346.

(b) Langford v. Webber, Hilary

Term, 2. & 3. Jac. 1. Roll 695.
3. Mod. 1320

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the plea, because he did not shew what title or estate he had, nor any seisin or freehold; and therefore judgment was given for the plaintiff (a). This way of pleading is not only contrary to all the authorities of the like nature in the old books, but those also of later times (b). Antiently when a tenancy at will was pleaded, it was always shewn how, viz. either by demise, or as a copyholder, or as tenant at sufferance (c); so where a *seisin in tail* was pleaded, it was constantly set forth of whose gift, because it is a particular estate: it is true where a *seisin in fee* is alledged, it is otherwise (d). My LORD BROOK in abridging of that case above mentioned says, it is good pleading, and has marked it with these words, viz. QUOD NOTA (e). It cannot be properly objected, that in a *bar* it is necessary to set forth a title, but not in a *writ* or *count*, because this objection is contrary to the old law; for it is as essential to set forth a title as well in the one as the other (f). Therefore where the pleadings in a *scire facias* were, that his father died seised, and that the lands descended to him as son and heir, &c. it was adjudged, that he ought to have shewn of what estate his father died seised (g). So in this case an action will not lie for depriving a man of such a common, because it is claimed as belonging to the *bare possession* of a tenant; so that his being a * *resiant* in the house, is an excuse to him for a trespass done in another man's soil; but certainly no action will lie for damage done to such a commoner, because there is no durable estate or interest laid to which any common may belong; but if he had set forth any interest, he ought to have made it more certain than to say *tantum ad tenementa spectant*. (b) for if this pleading should be allowed, then a possession under any title would be sufficient, which is so uncertain that no man can be provided to make his defence against it. There cannot be a case cited to maintain this declaration, but such where the *possession* is laid by way of inducement to the action, or such which have been brought against *tort feors*, or where there has been a seisin in fee alledged, and even most of those cases after verdict. In the case of *Skevil v. Auerie* (i) which was an action of trespass, assault, and battery, the defendant pleaded that he was *possessed* of a house for a term of years, and that the plaintiff would have thrust him out, and thereupon *molliiter manus imposuit*, and so justifies in defence of his *possession*, and upon a demurrer he had judgment; for though the defendant did not shew who made the lease, or how many years he had in it, or any particular estate, yet his plea was held good, because his setting forth a *possession* for years, was but an inducement to his *justification*,

* [420]

(a) Godfrey v. Rock, in the Common Pleas, in Trinity Term, 4. Will. & Mary.

(b) See 5. Com. Dig. "Pleader" (C. 39.) (C. 40.) (C. 41.).

(c) Bro. Abr. "Pleading" pl. 85.

(d) Cro. Eliz. 427. But see Cro. Car. 571.

(e) Bro. Abr. "Pleading" pl. 160. 170.

(f) But see Grimstead v. Marlow, 4. Term Rep. 719 where it is said, by HULLER, Justice, that this distinction between a *declaration* and a *plea* has been uniformly allowed.

(g) Year Book 24. Edw. 3. pl.

(b) Co. Ent. 9. 10. 14. Brownl. Ent. 250.

(i) Cro. Car. 138.

and the *possession* and not *the title* was the principal matter in that case; but where *an interest* is pleaded by the defendant, and he claims *a title*, it must certainly be set forth (a); and this is the very distinction made in *Babington's Case* (b). Now in the case at bar, it is not the *possession* which intitles the plaintiff to the common; for if so, then *de injuriâ suâ propriâ* had been a good plea, which no man will affirm. The case of *Brooking v. Bond* (c) is the same with this, but only it is said there, that *seisitus fuit* of a house and twenty acres of land; which words must be intended of a fee-simple estate: and afterwards when he says, *de jure habere debuisset* common, those words amount to a prescription. In the case of *Sands v. Trefusis* (d), the action was for diverting of a water-course, but there was *a seisin* in fee alledged in the mill, and so *de jure habere debuisset*, &c. was well enough; but no judgment was given. * In the case of *Scavage v. Hawkins* (e), which was debt for rent on a lease for years made by the father, who was tenant in tail, and died seised of the reversion which descended to the plaintiff, exception was taken that he did not set forth the commencement of the estate; but it was not allowed, because it was an action founded upon *the contract*, and he had shewn enough to intitle himself to it, the land being not in dispute; but this was *after verdict* wherein the right had been tried; so were the cases mentioned in the margin (f). In the case of *Dent v. Oliver* (g), which was for disturbing of the plaintiff from taking of toll in a fair, an exception was taken that he did not set forth a grant or prescription, &c.; but it was held good, because he said that he was seised in fee of the manor, &c. and of a fair to be held there every Ascension-Day; so that those cases are not applicable to that now in question, because in most or all of them a title is set forth by way of seisin in fee, but here the right of common is claimed without any title but only on *a bare possession*.

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IT WAS ARGUED *e contra*, that it was not material to set forth any *right* or *title* to which the defendant might give a particular answer, it being sufficient to ground this action upon the *right of possession* alone against *a wrong-doer*; especially since upon the general issue the plaintiff must prove his title, or be nonsuit; so that this is only a summary way to try the matter; and all declarations for stopping of ways, diverting water-courses, and disturbances in commons, are drawn and founded upon the *possession* without shewing *a title*. It is true, in actions upon trespasses, if the plaintiff will lay any charge upon the land, then he must set forth his title, as if the action be brought against *the owner* thereof; but when against *a wrong-doer*, there the ownership of the land is

(a) Cro. Jac. 52. Yelv. 74.

(b) 1. Roll. Rep. 13.

(c) In the King's Bench in Easter Term, thr 33. Car. 2. Roll. 109.

(d) Cro. Car. 575.

(e) Cro Car. 571.

(f) Franklyn v. Webb, in the King's Bench, in Easter Term, the 33.

Car. 2. Roll. 538. St. John v. Moody, 1. Vent. 274. 31st. 356.

(g) Cro. Jac. 43. 122.

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not in question, so that a *possession* alone is sufficient ground for that action. This was the difference taken by my Lord Coke in *Buckmer's Case* (a), viz. That in real actions founded upon a wrong, the plaintiff need not set forth a title, but it is sufficient to shew a *possession* against a *wrong-doer*; and if, upon the evidence at the trial, the plaintiff cannot prove a title, he will never recover. * He was of the same opinion in *Babington's Case*; and there he took another difference between an inducement to an action, and to a matter of title; for he held, that if an action on the case be brought for a nuisance done to a freeholder or in a way, it is sufficient to declare that he was *possessed*, &c. for a term of years, which, however uncertain, is only a conveyance to the action; besides, this way of declaring gives the defendant an opportunity to set forth his title, and to demand judgment against the plaintiff, for that he had shewed only a possession without a title. In *Michaelmas Term* in the thirteenth year of *Edward the Third* the *Abbot of Gloucester* declared, that he was seised in the manor of *M.* &c. by reason whereof he was intitled to have estrays, and that the defendant had taken two horses in the said manor, which *the Abbot* claimed, &c.; an exception was then taken, because he had not claimed this franchise as appendant to the manor, nor by grant; but that was not the question, the defendant must answer the wrong alleged to be done by him in taking of the horses (b). And for later authorities it has been held to be the usual course thus to declare even in actions of different natures; as in the case of *Escaut v. Lawney* (c), which was brought upon a lease for years of the toll and profit of a market and fair in *Tetbury*, and the defendant disturbing of him, &c.; exception was taken to that declaration, because the plaintiff did not shew that the lessor was seised in fee at the time of the demise made to the plaintiff; but it was not allowed, because *the title* of the land was not in question, but damages were to be recovered for an injury done. So for a disturbance in an office the plaintiff had mistaken his title, and in a special verdict another title was found for him different from that on which he declared; yet he had judgment (d), notwithstanding this variance, because the finding the title was held to be superfluous; it was the disturbance, &c. which was the occasion of the action. So likewise upon the statute of 2. & 3. *Edw.* 6. c. 13. for not setting out of tithes, the plaintiff seldom or never shews any title, but generally that he is *proprietary* of such a place; and this is held well enough, for he cannot recover without shewing a title upon the evidence at the trial (e): and lastly in trespass for a battery, *per quod servitium amisit*, the defendant pleaded in bar, that he was *possessed* * of a house in which he had lights, and that the servant of the plaintiff was building another house on the waste to obstruct the said lights, and that he *cum baculo* thrust him away; and, upon a demurrer, an

12. Mod. 510.
2. Peer Wms.
573.
Comy. 647.

* [423]

(a) 9. Co. 87.

(b) Fitz. Abr. title "Brief" pl. 674.

(c) Owen, 109.

(d) Cro. Eliz. 335. 419.

(e) 2. Bull. 66. Cro. Jac. 318.

362. 437. Yelv. 63. 5. Com. Dig.

"Pleader" (C. 39.). (2. S. 16.).

exception

exception was taken to this plea, that the defendant had not set forth of what estate he was possessed (a). It is true, in this last case it was held to be ill, because it was in a plea *in bar*, and that no issue could be taken upon it as pleaded; but had it been in a declaration, or in an action on the case for a nuisance, it had been well enough; because it would then have been only an inducement to the action: but the case of *St. John v. Moody* (b) was the very same with this; it is true, it was after a verdict, but; the Court did not rely upon that: so was the case of *Bound v. Brooken* (c), and that of *Heblethwaite v. Palmes* (d), in both which the declarations were upon a possession generally without a title; and held good (e). So in *Trinity Term 2. Jac. Rot. 28.* between *Cary v. Brockhurst* (f), the bailiff of *Westminster* shewed that he had a franchise, but did not say how he came to have a return of writs, or that he was seised of the bailiwick; and yet had judgment, which was affirmed in the exchequer chamber.

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2. Jones, 148.

CURIA. This declaration might have been better; for it is something difficult to understand what is here intended by the word *tenemento* of which the plaintiff says he was *posseſſee*; for he sets forth that it contained a fulling mill and a corn mill, &c. and a piece of land called *Wythybed*, &c. and then prescribes to have common in *Mendip*, as belonging to the said *tenement*, for cattle *levant et couchant* thereon, which is impossible; for cattle cannot be *levant et couchant* on a mill (g). In the next place he has not set forth what quantity of land is contained by the name of *Wythybed*, which he ought to have done, especially where the prescription is for a right of common belonging to it (h).

But upon the whole matter the declaration WAS ADJUDGED to be good:

FIRST, That the plaintiff need not set forth his *title* either by prescription or grant, because it is an action grounded upon *the possession* against a *wrong-doer*, to which action a title would be only an inducement.

* SECONDLY, That he need not set out any *title* whatsoever, because, as to the defendant who did the injury, it stands indifferent whether the plaintiff is owner of the soil or not; his business is to answer the wrong alleged to be done by him. It is true, if it had been upon a special pleading, as in trespass for distraining of his cattle, and the defendant had pleaded that he was owner of the soil, and so justified the taking, the plaintiff in such case must have replied, and shewed a title either by grant or prescription, or some other conveyance (i).

* [424]

(a) 1. Roll. Rep. 393.

(b) 1. Vent. 275.

(c) 2. Jones, 148.

(d) 3. Mod. 48.

(e) *Tamen quære*, for in this case it was that he was possessed *de antiquo aquæ cursu*, which implies a prescription.—
NOTE to former Edition.

(f) 1. Show. 17. 377.

(g) See *Scholes v. Hargreaves*,
5. Term Rep. 46. *Rider v. Smith*,
3. Term Rep. 766. *Clarke v. King*,
3. Term Rep. 147.

(h)

(i) Bull. N. P. 76.

Easter Term, 7. Will. 3. In B. R.

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1. Vent. 274.
2. Lev. 248.

AND LASTLY, this matter is not traversable; for upon the general issue, a right of common must be proved and given in evidence, otherwise the plaintiff cannot maintain his action, but what right is not material; and the case of *St. John v. Moody* (a) was relied on as full in point; the like in *Blockley v. Slaughter* (b).

And so the judgment in this case was affirmed, and the law settled in this point.

(a) 1. Vent. 275.

(b) In the Common Pleas, in Hilary

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peace " for so long time only as such " *clerk of the peace* shall well demean " himself in his said office." An appointment made by a *custos* under these statutes is, as to him, an appointment for life ; and therefore the *clerk of the peace* so appointed cannot be removed from his office by the same or any succeeding *custos* ; but by the same statute, 1. Will. & Mary, c. 21. " if " he do not demean himself well in " his office," THE SESSIONS OF the county, on application and proof made as the act requires, may remove him, *Harcourt v. Fox*,

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2. Lessee for life or years, or tenant at will, may prescribe to have such way, because it is only an easement, *Peers v. Lucy*, 366

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1. A latter clause in a will shall not be taken in a larger sense than what goes before; as a devise "to his daughter, upon condition she marry his nephew, &c. PROVIDED, if she refuse to marry him at or before she is twenty-one years of age, or in the mean time marry another, &c." and she did marry another, the nephew dying at twelve, these words, "or in the mean time marry another," must be intended marrying so as to make her incapable of marrying the nephew, *Thomas v. Howell*, 67, 68
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WORDS, THE CONSTRUCTION THEREOF.

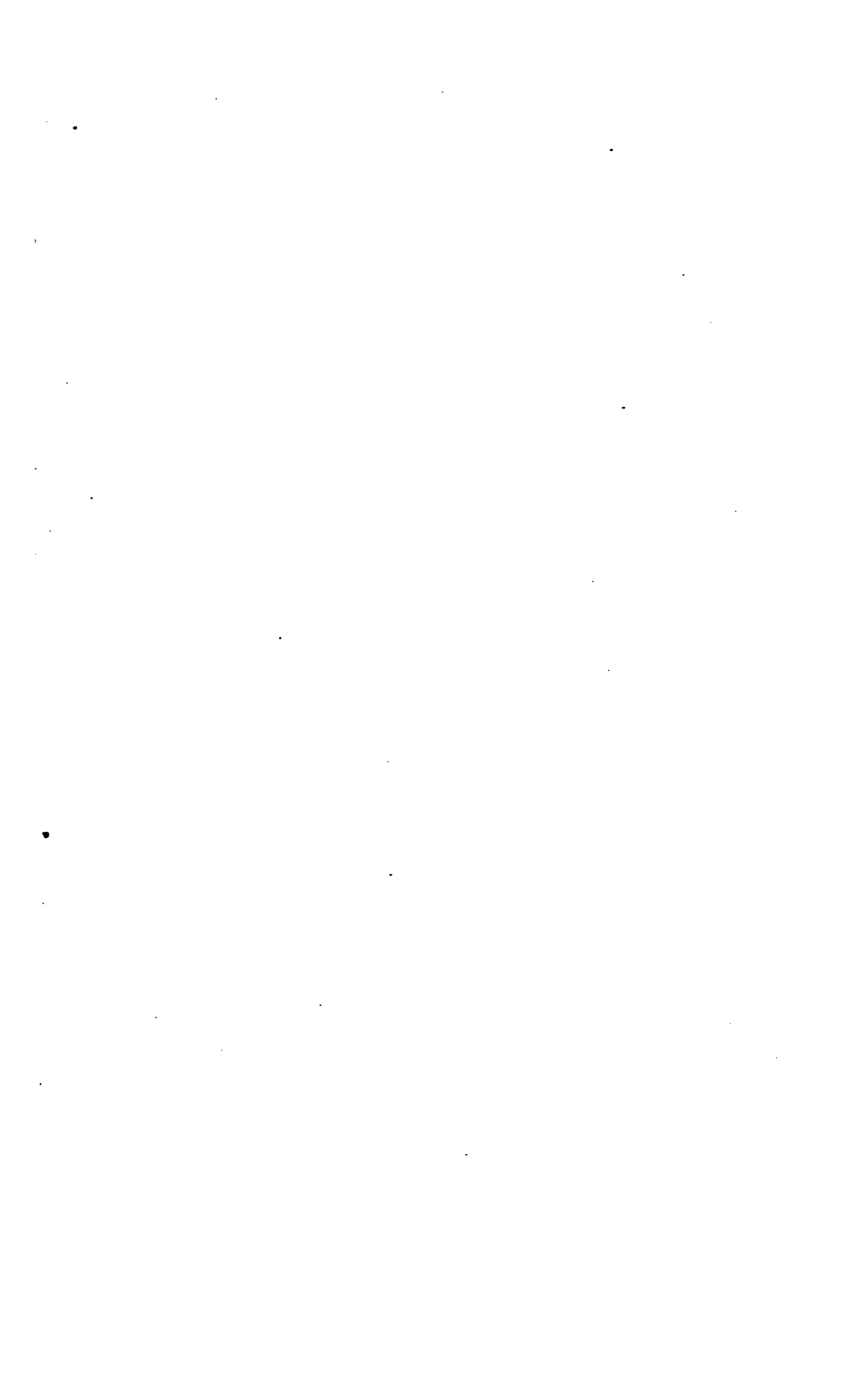
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END OF THE FOURTH VOLUME.







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